Supreme Court, U. S.
FILED
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5175

RANDALL DALE ADAMS, PETITIONER

v.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR CERTIORARI FILED AUGUST 7, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

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No. F-77-1286-1

THE STATE OF TEXAS v. RANDALL DALE ADAMS	IN THE CRIMINAL DISTRICT COURT NUMBER TWO OF DALLAS COUNTY, TEXAS

Relevant Docket Entries

March 28, 1977	9:15 A.M.—Begin Voir Dire—Panel of 50 qualified as group. 10:15 A.M.—Begin V. dire Individually w/juror #1. Voir Dire continues for four weeks and ..... days. Twelfth juror selected on April ..... 1977.
April 26, 1977	Case called for trial. Both sides announced ready. Jury selected, impaneled and sworn. Defendant arraigned. Indictment read. Plea of NOT GUILTY before the jury. Evidence presented. Jury charged. Arguments of counsel. Jury verdict of GUILTY of Capital Murder.
May 3, 1977	Punishment verdict: Issue I —yes Issue II —yes Issue III—yes

In the Criminal District Court No. 2 of
Dallas County, Texas

No. F-77-1286-1

[Record on Appeal (hereafter "Rec."), page 1A]

TRUE BILL OF INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said Dallas County, upon their oaths do present in and to the Criminal District Court, #2 of Dallas, County, at the January Term, A.D., 1977, that one, RANDALL DALE ADAMS, hereinafter styled Defendant, on or about the 28th day of November in the year of our Lord One Thousand Nine Hundred and seventy-six in the County and State aforesaid, did unlawfully, knowingly, and intentionally cause the death of Robert Wood, an individual, hereinafter called deceased, by shooting the deceased with a pistol and the deceased was a peace officer then and there acting in the lawful discharge of an official duty, namely: a uniformed patrolman conducting a traffic violation investigation, and the Defendant then and there knew that the deceased was a peace officer, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

HENRY WADE,
Criminal District Attorney of
Dallas County, Texas.

/s/ CHARLES L. COCKRELL,
Foreman of the Grand Jury.

Filed in the Criminal District Court No. 2 of Dallas County, Texas, on February 21, 1977.

In the Criminal District Court No. 2
of Dallas County, Texas

Individual voir dire examination
of prospective jurors

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[Transcription of voir dire examination (hereafter "VD"), page 31]

MRS. FRANCIS MAHON

[VD 33] [By Assistant district attorney Steve Tokley]:

Q. Now, this is a case that the law refers to as capital murder and by that we mean—we're talking about a situation where the Defendant, if found guilty, will receive either a sentence of death or a sentence of life. Those are the only two possible punishments provided by the law.

In this case, as you already know, the Dallas District Attorneys Office is seeking the death penalty. Let me ask you now, if you will tell us what your feelings are about the death penalty?

A. Well, I'm not real sure, it depends on the circumstances of the case. There are some, I feel that yes, they should have the death penalty but I think that others shouldn't. It depends on the case, on the situation.

Q. All right. I think that certainly is a fair [VD 34] statement. I don't think every murder calls for the death penalty and our law recognizes that, and prescribes a certain number of types of murder cases where the death penalty is involved. One of those is the unlawful killing of a Police Officer while that Officer is in the lawful discharge of his duty.

I'm not talking to you about this case, but if you were to sit in a case of that nature which is recognized by the law as a case that could call for the death penalty if the facts and circumstances called for it, would you be in favor of the death penalty?

A. Since it is a law, yes, I could.

Q. Now, how long have you been in favor of the death penalty in certain types of cases?

A. Well, I think there's always been a need for the death penalty in certain types of cases.

Q. Have you always been in favor of it?

A. Yes.

Q. Now, I want you to understand that when we discuss the death penalty with you, that we're not discussing a mass murder situation. We're discussing a situation where the Defendant, if found guilty, would be found guilty of the taking of one human life, do you understand that?

[VD 35] A. Yes, I do.

Q. Are you saying then that if you were selected to be on the jury and if it was the proper case, that you would be in favor of the death penalty?

A. Yes, if it's the proper case, yes, I think so.

* * *

[VD 60] Q. Now, do you feel like if you were sitting on the jury that you could listen to all the evidence presented in the case if you found the Defendant guilty beyond a reasonable doubt, finding him guilty along with the other members of the jury and could you, if the State proved to you that the proper answers to those three questions, beyond a reasonable doubt, would you answer the three questions yes, knowing that the sentence will then be set out by law to be death?

A. Well, I have no choice but to answer them yes if that's the way I felt and that had been proven, [VD 61] yes.

Q. Now, you understand when you say if that's the way you felt, would you answer them?

A. If that's the way the evidence was or that was—this has to come from me. It just can't come from what I hear. I would have to hear, weigh what I hear, and give it some very serious thought. It's just not something I can say yes I would or I wouldn't.

Q. Yes, I understand that. I understand that. But, understanding I'm not in a position to give you examples.

A. I know you're not.

Q. But let me put you in a situation here and you tell me how you feel.

Let's assume that you listen to the evidence of a case, you were convinced from the evidence as were the other eleven jurors, that the Defendant was guilty, you found him guilty of capital murder. You now know that there's only one of two possible punishments, either the sentence

of death or a sentence of life. You know that you're going to be asked those three questions at the close of the evidence in the Hearing. You listen to all the evidence in the second Hearing. You're convinced from the evidence presented to you in the trial that number one, he did act [VD 62] deliberately. Number two, there is this probability that he will commit future criminal acts of violence, based upon the evidence presented, and number three, you're convinced that he did act unreasonably in killing this victim, the evidence has convinced you of that. Therefore, the proper answers to these three questions would be yes, would it not?

A. At this point, I think yes. I don't know whether I would at a time like that, would weigh the death penalty over life or not. I'm really—I really just don't know.

Q. I'm coming to that in just a minute and I appreciate your candor on it. But are we to the point to where in my hypothetical situation, are we to the point to where you're convinced that the evidence shows that the proper answers to those questions is yes, one, two, three?

A. Yes, I'm to that point.

Q. That's been proven. All right. But let's suppose on the other hand your own personal feelings were, for some reason known only to you, your own personal feelings, were that this man should not get the death penalty?

A. Well, there would have to be something that would give me that feeling, I think.

[VD 63] Q. Well, I don't know that there would be any cause for us to speculate right now but can you see where that might happen?

A. Well, it could happen, you know it could happen.

Q. Then the question is, would you set aside those personal feelings and answer the questions yes based upon the evidence?

A. Well, I would be honest with myself.

Q. Ma'am?

A. I would be honest with myself and I think that's being honest with me, but I would have to answer yes if that was my conviction.

Q. Based upon the evidence?

A. Oh, by all means based upon the evidence.

Q. Well, you mentioned something about the sentence

of death or life, that you didn't know how that would effect you. What did you mean by that?

A. Well, I don't think you would ever really know how that would effect you until it came right down to the—I don't know. Since I know the Judge has a choice—

Q. No, the Judge—that's one he won't make.

A. Well, since I'm controlling the Judge's choice.

[VD 64] THE COURT: In essence, Mrs. Mahon, what Mr. Tokley is saying is that when—if we get to the punishment part, if he's found guilty of capital murder, then you really don't set punishment. You don't say we vote death, we vote life. You answer questions. The law contemplates that you will not—that you will answer those questions without regard to what punishment the answers would bring about.

In other words, if you believe that the evidence shows you beyond a reasonable doubt that all three questions should be answered yes, then you would answer them yes or no depending on the case, without regard to what punishment will result from that.

JUROR MAHON: Well, I think I would have to do that.

THE COURT: Okay.

A. (By Juror Mahon) It might be difficult to disregard.

MR. TOKLEY: Could I pursue that a little bit, Your Honor, that's the area—

THE COURT: Go ahead.

[VD 65] Q. (By Mr. Tokley) Let me tell you what the law says here and you tell me how you honestly feel. Let me again point out, there are no right or wrong answers, but this is very important.

A. I wouldn't know how to give a right or wrong answer.

Q. The law says that a perspective juror is disqualified, is disqualified, from serving on this kind of case unless they unequivocally say under oath, as you now are, that the mandatory sentence of death or life would not effect their deliberations on any issue of facts in the case.

Can you tell us that?

A. Well, I don't think so. I don't think it would effect me in any way. I've never been confronted with this.

Q. I understand.

A. But I don't think it would.

Q. Well, we've got to go a little deeper than that.

A. I know you do. Maybe I'll have to search me a little.

Q. Take a little time, why don't you, if you will do that for a moment. Because the law is very emphatic on that point. It says a juror must [VD 66] unequivocally state, unequivocally state that this mandatory sentence of death or life would not—not don't think so—but would not effect their deliberations on any issue of the facts in the case.

A. Say that again to me.

Q. Let me repeat that. Let me be sure you understand it and I'll take whatever time you feel is necessary.

A. Please, this makes me a little bit nervous.

Q. I can understand.

A. I wish I had a drink of water.

THE COURT: Could we have some water? See if you can find us some water.

JUROR MAHON: That's sure nice. I never did find a fountain in the hall.

MS. JAMES [Defense counsel]: Your Honor, the Counsel would also appreciate a drink of water on our table.

THE COURT: We'll see if we can take care of it. It will probably have to be at the next recess. We'll take care of the jurors now.

A. (By Juror Mahon) Now, would you state that again for me please?

Q. The law says a perspective juror is [VD 67] disqualified from service on this type of case unless they state unequivocally that the mandatory sentence of death or life would not, would not, effect that juror's deliberations on any issue or fact in the case.

Do you understand that?

A. Yes, I understand what you're saying.

Q. Now, again, this is why I say there are no right or wrong answers. There are some persons who can say unequivocally that it would not. There are others who tell us that it would effect their deliberations on these facts and issues. And there are some who tell us they just don't know whether it would or wouldn't and they never can give us any more of a straight answer than that.

A. Of course, I'm not trying to just get on the jury.

Q. I understand.

A. Because I just don't know. I really do not know

whether it would effect me or not when it came right down to it.

Q. Like law?

A. That's right. I'm really not sure.

Q. Well, in other words then—

A. Now, I do believe, if I may take it a little [VD 68] further, I do believe if at that time I can dismiss this other from my thoughts and think only of those questions and nothing else, then it would not effect my feelings. But, if at any time those two decisions came back to my mind—

Q. Yeah.

A. —it could effect me and I really cannot say no, it will not effect me, I'm sorry. I cannot, no.

MR. TOKLEY: We'll challenge juror for cause.

THE COURT: Ms. James?

MS. JAMES: Your Honor, the Defendant objects to the challenging of cause for Francis Mahon on the grounds no showing that she could be unequivocally influenced by her knowledge of the range of punishment, no matter what the facts showed and that there has been no showing she would not follow the Court's instructions and abide by the law and that she would not—there has been no showing that she would not take affirmative action in answering the special issues resulting in the death penalty of a particular type of prosecution in the case at bar, and no showing she would be [VD 69] unequivocally influenced by her knowledge of the range of punishment or that she would not set aside her feelings and vote to impose the punishment of death as a punishment for the offense of capital murder.

For those reasons, the Defendant objects to the State excusing Francis Mahon for cause as a juror in this case.

THE COURT: Let's—Mrs. Mahon, let me see if I understand your answers correctly. Is what you're saying, you cannot give us your unequivocal assurance that the mandatory penalty of death or imprisonment for life will not effect your deliberations on any issue of fact? Now, that's a double negative but that's the way I have to pose the question. You cannot unequivocally assure us that the penalty of death or life will not influence or will not effect your deliberations or an issue of fact, any issue of fact?

JUROR MAHON: Well, if—as I said, if I was thinking of

fact only and I was dealing only with facts, I could answer that yes or no I feel sure.

[VD 70] THE COURT: Well, that's—go ahead.

JUROR MAHON: Based on what I had heard, the facts that were presented. But I did say that I was afraid or I did not know when it came right down to it and if there was any doubt in my mind about one of those questions, that I would not be influenced by life or death. If there was any doubt in my mind about one of those three questions that were asked, then I might have a tendency to say no to one of them if there was a doubt in my mind there. You see what I'm saying?

THE COURT: What you're saying, you cannot give us your assurance that you would not be influenced by the punishment in answering the questions on fact issues.

JUROR MAHON: Well, I'm saying I could be influenced and I think most anyone could be.

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[VD 348] FORREST J. JENSON

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[VD 351] [By Assistant district attorney Winfield Scott]:

But, in light of that, we obviously need to know, as the Judge indicated to you, we need to know what your feelings, your attitudes are about the death penalty. Could you share them with us now?

A. Well, I think I believe in letting the punishment fit the crime. I've never had to decide whether or not somebody lived or died and I don't know if I could or not. I feel like I could if I had to.

Q. Okay. That's why we're talking about it now. In other words—

A. It would have to go beyond all reasonable doubt, I think, before anybody would take it upon themselves to judge someone else. But if so, I feel like I probably could.

Q. All right. Well, that's why we need to cross this bridge right now. And let me ask you, have you—why do you feel the death penalty is proper in certain cases?

A. Well, I'm not—I wouldn't say I'm really for the death penalty, but I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent that we have.

[VD 362] Q. (By Mr. Scott) So you're saying it's your personal feelings—in other words, you would answer the questions regardless of whether you personally felt he should not die?

A. Well granted, I think I would probably let my conscious kind of be a guide all the time through the trial while you're weighing all the evidence.

Q. Right.

A. But when it got down to the end, you would—you got to make a decision, will it be yes or no, it can't be both.

Q. Well, would you answer the questions yes, yes, yes, if you thought those were the proper answers and knowing that that's going to result in his death, even though you thought he should not have to die for what he did or would your feelings force you in good conscious to answer one no to save it? Like you think he ought to be saved?

A. Well, if I personally thought he ought to be saved, then I wouldn't be convinced that he was positively guilty then.

Q. So your feelings—

A. I mean, there's bound to be one of three I wouldn't agree with so I would have to vote no on one of them.

[VD 363] Q. In other words, I'm talking about if you feel the answers should be yes, yes, yes?

Ms. James: Your Honor, now the Prosecutor is attempting to get a commitment from him. I think he's going at this in such a way—

The Court: Overruled.

Q. (By Mr. Scott) I'm saying if the evidence convinced you the answers should be yes, yes, yes and yet at the same time, you feel the answers should be yes, yes, yes even though you know that's going to send him to the chair. Your personal feelings are that yes, I think it was intentional and yes, I don't think there was any provocation and yes, I think there's—more likely than not that he may well commit some sort of criminal acts of violence against property or people in the future, but I don't know how serious those acts are going to be.

Criminal acts of violence, I submit, could include breaking out somebody's plate glass window, it could be several acts. I don't know whether it was that or killing another Police Officer but whatever it is, I personally—even though I'm answering those questions yes, yes, yes—I personally

don't think this man deserves to die for what he did and therefore, [VD 364] because I feel that way, the only way I know to save him is to misanswer one of the questions and answer it no to save him.

Now, in effect, that is what a person is faced with. In other words, we don't have any quarrel with the person who feels that way, we just need to know it now. If you feel like you have to, in effect, misanswer a question to make a verdict fix your conscious—

A. No, I don't believe I would.

Q. You would go ahead and let the chips fall where they may?

A. Yeah, I think I would.

Q. What about on guilt or innocence? In other words—on guilt or innocence, if you felt the man was guilty and should be found guilty and yet you knew that a finding—you have heard enough evidence in the guilt or innocence phase to convince you you're going to answer those three questions yes, would you in any way, knowing that the ultimate—the guilty verdict is probably going to end up resulting in a death sentence because of the three yes answers that are abundantly clear in the case itself.

Would you in any way want to vote for not guilty to save him from the electric chair that way?

[VD 365] Ms. James: Your Honor, this question has been asked and it's repetitious. He's going over the same ground over and over again and I object.

The Court: Overruled.

Q. (By Mr. Scott) Would that interfere with your thinking?

A. I think if I had already made the decision in my mind that the answers to all three of them were yes and unless I—something come up that would disprove one of these three answers, I doubt if I would change.

Q. I'm talking about back on about guilt. In other words, would your feelings—

A. Oh, we're deciding the guilt or innocence?

Q. If you feel he's guilty but you honestly feel he should not get death, would that effect your deliberations on guilt?

The Court: Excuse me, pardon me. I think he's missed something in this. The trial actually has two parts.

Juror Jenson: Right.

THE COURT: The first part you decide is he guilty or not guilty. If you find him not guilty, that's the end of it [VD 366] If you find him guilty, then you get into a Punishment Hearing.

JUROR JENSON: Right.

THE COURT: And as a juror you never do vote life or death. All you do is answer three questions. Do you follow that?

JUROR JENSON: Right.

THE COURT: What Mr. Scott is asking you—he's back on the guilt or innocence part.

JUROR JENSON: Yes.

THE COURT: He's asking you, if after hearing the evidence, you go out and you have to decide is he guilty or not guilty. Is the fact that the death penalty will be a consideration down the line, if he's convicted, is the fact that it could wind up being a death penalty type of case, is that going to influence your verdict on guilt or innocence? Or, on the other hand, will you call it as you see it and if he's guilty, say he is and if he's not guilty, will you say so?

JUROR JENSON: I don't think so [VD 367] because even if we decide he's guilty or I decide he's guilty, you still have two alternatives. I mean, even if he's guilty, at that stage in the game, you don't necessarily have to decide whether he's—he'll get three yeses or two yeses and one no or what have you. You haven't sentenced him to the electric chair or what have you until the second stage and that's where you make the decision there. You kind of take it one step at a time.

Q. (By Mr. Scott) That's true. What we need to know is whether your feelings about the death penalty would effect the way you deliberated on the questions? Would it effect your—

A. Well, I think it probably would because afterall, you're talking about a man's life here. You definitely don't want to take it lightly. Now, if you went in here and, you know, if he was going to get life and probably paroled in some years, it puts a whole new light on the subject. But when you have got the death penalty to deal with, I think you have got to be pretty certain.

Q. So you feel your feelings would enter into the deliberations on those questions?

[VD 368] A. Right.

Q. And the feelings that you have, I take it, about the death penalty and its propriety, are strong, aren't they? Let me—I take it then, that mandatory penalty of death or imprisonment for life would effect your deliberations on the issues of fact in the penalty phase of the trial—those three questions on your deliberations?

A. Yeah, I think it would. But still again, if—if he's proven guilty, you know, beyond all reasonable doubt to me, and I think my conscious could clearly—I could vote—I think I could vote yes to all three questions. But, like I say, that's my conscious I'm dealing with.

Q. But if you found him guilty and then you're in the penalty phase and you really feel that he should not get death, I take it, that that feeling would effect the way you deliberated the three questions?

A. Well, I'm just human just like everybody else.

Q. Sure.

A. I think it probably will effect anybody's.

Q. I'm not going to argue with you about that. I just need to know. And we appreciate your being honest with us. So what you're saying is that it would effect your deliberations, your feelings about—

[VD 369] A. Right.

Q. —whether or not the guy ought to get life or death would effect the way you deliberated those three questions?

A. Yes, I believe so.

Q. And do you think it would—let me just say that there's an oath that a juror would have to take and from what you told me, you would not be able to take this oath, but let me go through it with you.

The oath is that the mandatory penalty of death or imprisonment for life that you would have to state under oath that it would not effect your deliberations on any issue of fact, including those three questions.

And I take it from what you've told said that you could not take that kind of oath, could you?

MS. JAMES: I object to the Prosecutor's conclusions, Your Honor.

A. Well, yeah, I guess it would.

THE COURT: Don't answer.

A. I don't know of anybody it couldn't because, I mean,

I haven't heard the evidence yet. I don't know what we're talking about. Now, if the evidence—if I hear the trial and I decided that the man is guilty, then I have heard all the circumstances, you [VD 370] know, you can have guilt but the circumstances—still the circumstances around it, you know, may change everything. I mean, a man goes out and steals a cow just for kicks. But a man that's starving to death goes out and steals a cow, is a lot different.

Q. Sure. What I'm getting at is, even though this oath is required, that is, that you just flat throw your feelings out the window, that's what the oath in effect requires—

A. Well—

Q. —you're saying you couldn't do that?

A. I don't think so. I don't believe anybody could because you might as well get a computer to sit on the jury.

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[VD 613] MR. GEORGE C. FERGUSON

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[VD 614] [By Assistant district attorney Winfield Scott]:

Now, we need to know from you just how you feel about capital punishment, about the death penalty. I know the Judge mentioned that to all the jury panel and could you share with us now what your feelings about the capital punishment, any reservations you have about it or any convictions you have regarding the subject.

A. Well, I would much rather see a life sentence. I don't even like hunting, I don't like to kill animals. So my feeling is that possibly it may be more painful to have a life sentence.

Q. All right. Do I take it from that that you're opposed to capital punishment?

A. Yes, I am.

[VD 615] Q. And have you been opposed to capital punishment most of your life?

A. Yes, I have.

Q. And I take it you have strong feelings on that point, don't you?

A. Well, pretty strong. Of course, you know, someone—if in self defense, I wouldn't have any feeling about it, I would do it, but otherwise, I do.

Q. I'm talking about the legalized execution. I'm talking

about legalized—in other words, placing someone in an electric chair and running electricity through his body.

A. I don't think I want to do that.

Q. And I take it from what you have said, that you personally just flat, because of the way you feel, could not be involved in that yourself?

A. It would be too hard for me to do. Now, I'm not going to say that I might not see enough that would convince me, but at that point, I would say it would be almost impossible that I should say, kill somebody.

Q. And so—well, your feelings on the subject, I take it, are strong enough that you have grave doubts in your mind that you would never vote for death?

[VD 616] A. I believe so.

Q. All right. Do you think there is conceivably ever a case that you personally would ever take pen in hand and sign your name to a death warrant?

A. I don't believe so.

Q. You don't think you could ever do that?

A. I don't believe so.

Q. Are you then really flat opposed to the death penalty to the extent where you would automatically have to vote against it in order to be straight with your conscious?

A. With my conscious, yes.

Q. You would have to automatically vote against that?

A. Yes.

Q. All right. Now, I understand your position, sir, and I'm sure your feelings are firm and fixed on this point, but the law requires me to go a step further and then we'll be done with this and hopefully your service—it will be clearer what your position is. But let me—the law requires I go one step further because of the new procedures that we have.

The law as it stands now in Texas, you don't simply go out and deliberate on guilt or innocence and then death or not death. The procedure is a little [VD 617] different than you might have expected. There are actually three questions that you answer and these three questions are as follows: whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and intentionally and with reasonable expectation that the death of the deceased or another would result.

The second question is whether there is a probability

that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. Now, that addresses itself to the future and has to do with criminal acts of violence. Now, it doesn't say acts of violence against people or property. It could be either one. And it doesn't talk about how serious those acts have to be; whether it's murder or breaking out somebody's plate glass window or what have you. But it does talk about it in terms of acts instead of one future act.

Now, the last question has to do with, if raised by the evidence, whether or not the conduct of the Defendant in killing the deceased was unreasonable in response to provocations, if any, by the deceased. Of course, if there's no provocation, the answer to that question would automatically be yes.

The law says once a jury starts their [VD 618] deliberations in an effort to answer those three questions, the answers naturally have to be either yes or no. And the law says if the jury comes up with three yes answers then that is a mandate to the Judge to sentence the Defendant to death.

Now, the Judge has no discretion at all in the matter. Three yes answers equals death by electrocution. One no in that group would result in a life sentence. In other words, that's the only other punishment that's available.

Now, as you can see, that's sort of an indirect death sentence but it's nonetheless, just as much a death sentence whether you go at it directly or indirectly. The end result is still the same.

Now, I take it that your feelings are such about capital punishment that your feelings would effect your deliberations in a case on the issues?

A. Well, the three questions that you mentioned, I think I could honestly try to answer those questions the way I saw them.

Q. I understand.

A. But as far as voting for the death penalty, I wouldn't want to do that.

Q. Well, do you understand that's, in effect, what you would be doing?

[VD 619] A. Yes, I understand that and in a round about way you're doing it.

Q. It's not round about, three yes answers, that's death and that's my point. We don't want to thrust you on a jury and cause you to violate your conscious. And if you're telling us that you honestly could not, in good conscious, allow yourself to be put in the position of having to ever answer those questions because of your feelings, well then, we understand.

You see, a lot of people come down and think well, if I don't agree to be on the jury, then I'm not being a good citizen and that's just not true. You're being just as good if you honestly tell us how you feel inside. That's just as important to law enforcement and to the administration of justice, as to the person who comes down and says yes, I can serve. Some—not everybody can fill those twelve seats.

From what you have told me earlier, I got the distinct impression if you were forced to anwser those questions, if you were forced to deliberate on death, that you personally just could never be a person who could do that?

A. It would be hard.

Q. And I know what you mean when you say it would be hard, but I actually have to carry it a step [VD 620] further and just ask you; you had said earlier you would automatically have to vote against death and I take it that's the way you honestly feel?

A. At this point, I think it is.

Q. All right. And so therefore, I take it that you could not state under oath that the mandatory penalty of death or imprisonment for life would not effect your deliberations? I take it they would effect your feelings about that, would effect your deliberations on any issue of fact.

A. Well, they might. Of course, I have got a son that's a Policeman. He's been a Policeman twelve years and if this had been my son, then I might feel all together different.

Q. All right.

A. I don't know, but like I say—

Q. Well, it makes a big difference if it's somebody in your own immediate family. And I think that that's why jurors cannot be on a case that they're directly involved in. This wasn't your son, Officer Wood, and I think—I know a lot of people who share your feelings about things like this, that if it was someone in your own immediate family, you might want to take matters in your own hands.

But as far as being on a jury, obviously, you could never be on a jury [VD 621] involving someone in your immediate family. Are you saying that unless it were someone in your immediate family?

A. No, I'm not saying that. I'm saying my feelings would probably be much stronger and had it been my son, I might be able to sit on a jury and be able to say I voted for the death penalty. But since it isn't, I think that would be an indelible memory that I would have.

Q. Such an indelible memory that you just—

A. I think it would be troublesome to me.

Q. And you're afraid it would affect you to the extent that you could not in good conscious ever consider the sentence of death, whether you arrived at it directly or indirectly?

A. I don't believe I could.

Q. And therefore, you could not state under oath that the mandatory sentence of death or life would not affect your—it would affect your deliberations?

A. Yes, it would.

• • •

[VD 623] THE COURT: All right. Now, so the question is, could you give us your assurance without reservations that if [VD 624] you're on the jury and you found him guilty of capital murder, that your deliberations on those issues of fact on those three questions, could you give us your assurance that you would not be influenced in answering those questions by the punishment of death or life imprisonment?

MR. SCOTT: Your Honor, I would ask that it be posed to the other alternative also since he's indicated all along—

THE COURT: Let me get a clear cut answer to this first because I don't know that it's been put exactly in those terms.

JUROR FERGUSON: I can't, at this point, see how it could keep from influencing me in some fashion. Now—

THE COURT: Now, life imprisonment?

JUROR FERGUSON: No problem.

THE COURT: All right. Well, do you think that punishment of death would affect your deliberations on the issue of facts involving the punishment hearing in a capital murder case?

JUROR FERGUSON: Well, if you were [VD 625] putting me in a situation where I knew it was—saw it was a yes answer to those three questions that, in effect, I would be doing the same thing as sending him to the electric chair.

THE COURT: Is what you're saying, knowing he would go to the electric chair, are you saying that would affect your ability to answer those questions?

JUROR FERGUSON: It wouldn't affect my ability, but it would cause me to do some squirming trying to be honest in my answers if I felt like the answers to the three questions was yes.

THE COURT: Do you think it would affect your deliberations on these issues of fact?

JUROR FERGUSON: I don't see how it could keep from affecting it some.

THE COURT: All right. Do you have any further questions, Mr. Scott, in light of that answer?

MR. SCOTT: No, but we would like to submit for cause both under Witherspoon and under the oath, 12.31.

[VD 626] THE COURT: I'll take it one step further now. From what you say, are your feelings in this regard so strong that you could not set aside those feelings and vote on those issues of fact on a punishment hearing and set out of your mind the question of the death penalty? This is another way of saying the same thing, I guess. But are you saying under all circumstances that it would influence your deliberations on these fact issues?

JUROR FERGUSON: I don't see how it could keep from influencing it. That's what I'm trying to say.

THE COURT: I understand.

JUROR FERGUSON: I don't see any way that it could not in some fashion influence my thoughts. Now—

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[VD 1017] NELDA COYLE

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[VD 1023] [By Assistant district attorney Steve Tokley]:

Q. The first thing I'm going to tell you is that this is a capital murder case. By that I mean it's the type of murder where if the Defendant is found guilty he would receive only one of two possible punishments, either a sentence of death

or a sentence of life. Those are the only two possible punishments.

In this case the District Attorney's office is seeking the death penalty. Now, knowing that I want you to tell me what your feelings are about the death penalty.

A. You mean if it should be?

Q. Yes, to start with.

A. Well, I'm not against it in certain circumstances.

Q. Are you in favor of it in certain circumstances?

A. Yes.

Q. Okay. Now, how long have you been a believer in the death penalty in certain types of cases?

A. Always.

Q. Always?

A. Ever since I can remember.

[VD 1030] And may I, from talking to you, aren't you telling me that—or are you telling me—let me put it this way: Are you telling me that the mandatory sentence of death or life would affect you in your deliberations on any of those issues of fact?

A. I believe so.

Q. That is what I understood from talking to you. And may I take from what you just then said that you could not say under oath that the mandatory sentence of death or life would not affect you in your deliberations on any issue of fact?

A. It would bother me.

Q. It would affect you in your deliberations, is that what you are saying? I have to ask you in the words of the law.

A. Yes.

[VD 1031] Q. And therefore, since the mandatory sentence of death or life would affect you you could not say under oath that it would not, is that correct?

A. Right.

* * *

[VD 1046] THE COURT: Let me see if I can be of some help. It's really this simple. When you deliberate to decide upon a fact in this case, to decide factual issues whether it is—whether the Defendant is guilty, whether you should answer the question yes or no, whatever, the law says in order to be qualified to be on this Jury you have to be able to give these lawyers and give me the unequivocal assurance that when you deliberate with the other jurors on those

questions that you will not be affected in any way by the punishment that could result from the case. That in deciding whether the Defendant for instance would commit future acts of violence and in reaching your decision on that and in voting and filling out a [VD 1047] verdict form, that you wouldn't be influenced in any way by the fact that death might result or life imprisonment might result. That you will simply listen to the evidence and decide those facts without regard to what the effect would be, whether life or death would ensue. Do you follow?

JUROR COYLE: (Juror nods.)

THE COURT: Some people can do this and some people can't. Some people can sit on a jury and listen to the facts and reach a decision based upon the facts decide if it was deliberate, if there is a probability of future acts of violence and whether or not there was provocation that was reacted to or not. Other people can't. They feel that, well, if I'm on the jury there is no way that I can really put out of my mind about death or life and just answer the questions and I know that I would be affected by what punishment would result in trying to answer these questions. Do you follow [VD 1048] me?

JUROR COYLE: Yes.

THE COURT: Now, what I think this is—what Ms. James is getting at and it's the very question Mr. Tokley asked perhaps in a little different words. Where do you stand or sit on this? In other words, would you be——

JUROR COYLE: Like I told him. I haven't done this before so I would simply not know.

THE COURT: Okay. I understand your answer.

JUROR COYLE: Do I have to say yes or no?

THE COURT: No, if you don't know, you don't know. Up to this point, you see, the State is entitled to have twelve jurors that can follow all of the law in this case and the defense is entitled to have twelve jurors the same. That is why we spend so much time talking to the jurors. There aren't any right or wrong answers, don't concern yourself about whether [VD 1049] you are—what you are saying is wrong or right. All we are trying to do is find out how you feel.

Now, the State is entitled and the defense is entitled to twelve jurors who will listen to this case and can assure all

of us at the outset that their deliberations on these factual questions will definitely not be influenced by the punishment.

What you are saying, as I understand it, is that you really don't know, and I take it by that to mean you are not sure if it would and you are not sure if it wouldn't?

JUROR COYLE: I haven't done this before.

THE COURT: But is that a fair statement of what you are saying?

JUROR COYLE: Yes.

THE COURT: Okay. Now, to take that to the next step, is that to say that it is possible that your deliberations on these factual issues could be affected by the punishment?

[VD 1050] JUROR COYLE: That I couldn't answer because of the punishment.

THE COURT: Well, not that you could not answer it but that your answer or your deliberation would or could possibly be affected by the punishment that might result?

JUROR COYLE: I'm not sure I understand what you mean.

THE COURT: Okay. My question is, both sides are entitled to have twelve jurors who unconditionally guarantee us that when you are deliberating on these fact issues, when you go back and deliberate your verdict, you are trying to decide should I answer this question yes, should I answer this question no, should I answer this question yes, should I find him guilty or not guilty, that in deciding these things that the punishment of life or death would not affect your deliberations, that you would deliberate on those fact issues without regard to what the punishment is in the case.

[VD 1051] JUROR COYLE: Yes, well, I think I could answer that.

THE COURT: Now, earlier you had told Mr. Tokley, I believe your statement was that you could not or you were not sure if the punishment that might result whether it would or would not affect your deliberations on these fact issues.

JUROR COYLE: It's difficult for me to say because I have never been in this position before.

THE COURT: Now, what—the reason we all dwell on this so long is very simple. The law says that nobody can serve as a juror on a case where the death penalty could be involved, in a capital case, nobody can serve on that jury unless they can definitely assure all of us that they will in

no way be affected in their deliberations of facts by the punishment that is involved.

Now, if we cannot get this assurance then you are not a qualified [VD 1052] juror, you see? Even though you would say well, maybe I could and maybe I couldn't.

JUROR COYLE: Well, I'm sorry. I follow you. I just don't know.

THE COURT: That is fine. If that is the way you feel that is fine because we get a lot of people that say I won't be affected and a lot say that they would. And there are also a lot that say I really don't know.

You see, it would not be fair to the Defendant for instance——

JUROR COYLE: I understand.

THE COURT: You see, to have a juror that might gauge a certain answer to get a certain result on punishment would not be fair.

JUROR COYLE: I understand.

THE COURT: And the same to the State. So that is why we have to have this assurance from the juror that there is no question in your mind but what you could follow the law and not be affected in your deliberations by [VD 1053] the punishment.

Now, I understood earlier, and let's go back to this, that what you are saying is you are not sure?

JUROR COYLE: That's right. I haven't done this before.

THE COURT: Okay. And that maybe you won't be affected and maybe you would? Now, I take your unsure to mean maybe I would and maybe I wouldn't?

JUROR COYLE: I know it's sort of wishy-washy.

THE COURT: No.

JUROR COYLE: But I can't tell you something that I haven't done.

MS. JAMES: Actually, Your Honor, I believe the best qualified jurors are those that come with no preconceived notions.

THE COURT: That might be, Ms. James, but let me finish this.

What I'm trying to do, I guess, is to find out more about what you mean when you say that I'm not certain or I don't know, because it's the I don't [VD 1054] know that really brings the problem. It's the I don't know or I'm not sure

means that maybe I would not be affected or maybe I would be affected, is that what it means, the I don't know, because until I get there I won't know and it's possible I could and it's possible I couldn't?

JUROR COYLE: Right.

THE COURT: Okay. You understand the situation we are in now is, and I'm not trying to get you to change your answers, I know you won't, you tell us exactly how you feel, that is what this is all about right here. The dilemma right now is that Ms. James wants to find out for certain whether or not you could or could not—back up.

We need to know before you can be on the jury, we have to know that you would not be affected by the punishment in your factual deliberations and I understand at this point in time that—what you said is you cannot give us [VD 1055] that assurance.

JUROR COYLE: (Witness nods head.)

MR. TOKLEY: Let the record reflect her answer was yes.

THE COURT: You have to speak out so she can take down what you say. What was your answer to that, ma'am, you nodded yes, but what was your answer?

JUROR COYLE: Rephrase it.

THE COURT: All right. As I understand it you are not able at this point in time to asure us that your deliberations on the fact situations would not be influenced by the punishment, is that correct?

JUROR COYLE: That's right.

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[VD 1063] Q. (By Mr. Tokley) All right. Then the question was asked of you, we discussed the procedure in this type of case. I discussed it with you, the Judge discussed it with you and Ms. James has discussed it with you, that the procedure being this is a trial in which there are two parts. The first part has to do with whether or not the Defendant is guilty of the crime that is charged. That is an issue in the case. If guilty then the second part has to do with whether he receives the death penalty or life sentence. That is determined by the answering by the jury of three questions. We discussed those three questions and discussed that three yes answers equal death, one or more no answers will be a mandatory life sentence.

And then I asked you after explaining the State's burden of proof throughout the case, I then asked you if your feelings concerning the mandatory sentence of death or life would in any way affect your deliberations on any of those issues of fact in the case.

MS. JAMES: Your Honor, I would object to the prosecutor attempting to [VD 1064] lead the witness, that each and every time that the witness gives——

THE COURT: He hasn't finished the question yet.

MS. JAMES: I'm making my objection.

THE COURT: When he finishes his question, I will allow him to finish the question before I allow your objection.

MS. JAMES: I thought he was finished. Excuse me.

Q. (By Mr. Tokley) I believe you said that at first you didn't know whether it would or not?

A. That's right.

Q. Is that the way you feel?

A. Yes.

Q. And therefore——

A. But if I had to make a decision, I guess I'm goofing this whole thing up, but I don't know what else to say.

Q. Well, I think what we want to know from you is—you have told us and I think you have tried to tell us and have repeated it more than [VD 1065] one time, that you cannot tell us whether the mandatory sentence of death or life would affect your deliberations or not?

A. I haven't been there.

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[VD 1067] Q. (By Mr. Tokley) Mrs. Coyle, can you tell us at this time unequivocally that the mandatory sentence of death or life would not affect your deliberations on any issues of fact in the case?

MS. JAMES: The same objection, Your Honor.

THE COURT: Same ruling.

Q. (By Mr. Tokley) Can you tell us that or can you not?

A. I cannot tell you this because I don't know.

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[VD 1525] MRS. LLOYD WHITE

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[VD 1528] [By Assistant district attorney Steve Tokley]:

Q. What are your feelings about the death penalty?

A. I guess I just don't believe in capital punishment then.

Q. Fine. No one has any quarrel with you about that. You are certainly entitled to that and that is what we need to find out from you.

THE COURT: Let me help, see if this will help you relax a little bit.

There is no right or wrong answers, it's a question of how you [VD 1529] feel. And the most important thing is that the lawyers and I know how you feel about these things. That is all we are trying to do is to find out how you feel, okay?

And as I understand it you do not believe in or are opposed to capital punishment; is that correct?

JUROR WHITE: Let me say this: I always thought I believed in capital punishment but as soon as—when it comes to me, someone asking me, it's just difficult.

THE COURT: Let me try it this way—

JUROR WHITE: It's hard to answer or something.

THE COURT: All right. Let me ask you this, Mrs. White. There is one group of people we run into who believe in the death penalty, they believe it's a good law, they can sit on a jury and vote on it in a proper case if they thought it was proper.

Another group is opposed to the [VD 1530] death penalty, they don't want anything to do with it, they wouldn't vote for it.

There is another group that believes in capital punishment but they don't themselves believe that they themselves should be the ones to have to sit and vote it although they believe in it, they themselves could not sit on a jury and vote for it.

There is yet another category that are opposed to it but they feel they could sit on a jury and do it even though they are opposed to it. Even though—because it is the law.

JUROR WHITE: I think I believe in capital punishment but I don't want to have anything to do with it, is that clear?

THE COURT: Well, that helps us understand.

JUROR WHITE: That is my feeling.

Q. (By Mr. Tokley) All right. You believe in capital punishment but you personally [VD 1531] could never sit in a case which would call upon you to make decisions that could lead to a man's death?

A. Uh-huh.

Q. That is your feeling?

A. Yes.

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[VD 1535] Now, you have told us that even though philosophically you are in favor of capital punishment you yourself personally could not be involved in this kind of situation, am I correct?

A. Yes, sir.

Q. All right. May I from your answers—are you saying that this mandatory sentence of death or life would affect your deliberations on the issues of fact in the case including those three questions, is that correct?

A. Yes, sir.

Q. No doubt about that I presume, but the mandatory sentence would affect your deliberations?

A. Well—

[VD 1536] Q. Do you understand my question?

A. No. Say that again, please, sir.

Q. You have indicated to the Judge quite strongly that you personally even though believing in the death penalty could not, because of your own reasons and your own make-up, sit in this type of case and make decisions that could result in the death penalty, we are clear on that?

A. Uh-huh, yes, sir.

Q. From that then are you saying that the mandatory sentence of death or life would affect you in your deliberations on the issues of fact in the case?

A. In voting on it, is that what you mean?

Q. In your deliberations on it, yes.

A. Well, I don't know.

Q. You cannot say that it would not, is that correct?

A. Yes.

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[VD 1543] THE COURT: Let me ask you this: Would you ever in a case, would you ever be able to, if you were a juror, we are talking hypothetically, if you were a juror would you ever be able in a capital murder case to vote yes to all three of those questions if the [VD 1544] evidence dictated to your way of thinking that the correct answer would be yes, would you ever be able to vote yes to all three questions in a

capital murder case realizing that the death penalty would result?

JUROR WHITE: I don't think so.

THE COURT: All right.

MR. TOKLEY: I challenge for cause, 1231.

THE COURT: Let me go back and ask this. If you were on this jury, could you give your unequivocal assurance, I'm asking hypothetically, could you give us your unequivocal assurance if you were on the jury and if you did find him guilty of capital murder that you could answer those three questions on the punishment part without in any way being affected by the punishment that exists, the death or life punishment, or do you think that knowing the punishment is there would affect your deliberations on those questions? [VD 1545] JUROR WHITE: It would probably affect me in my deliberations.

THE COURT: All right. Would it be fair then to say that you cannot give us your assurance that you would not be affected by the punishment of life or death in deliberating the fact issues in the case?

JUROR WHITE: That's correct.

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[VD 1547] THE COURT: I think what Ms. James is saying, could you ever if the case was just bad enough, could you ever set aside your feelings and vote for the death penalty either directly or indirectly?

JUROR WHITE: I guess I could, I guess I could.

Q. (By Ms. James) All right. That is the answer. There are no right or wrong answers but that is your answers that you could?

A. I guess I could.

Q. You could set aside your own personal feelings and vote yes if the facts definitely justified it?

A. I guess I could.

Q. We would not want you to vote yes—we need your honest vote on the questions, not on your feelings. In other words, if you felt that the fellow should get death but you feel some of the [VD 1548] answers should be no you would be obligated to vote no in answer to the questions regardless of your feelings and also the converse is also true. If you

felt that some of the questions or all of the questions should be answered yes but your personal feelings were to set it aside and attempt to save him from the penalty, whichever it is, you would still have to answer yes if you honestly feel that the answer to that particular question should be yes, you understand now?

THE COURT: Do you understand what she is saying?

Q. (By Ms. James) You have to have—you have to vote the question—the answers to the questions honestly irregardless of what you think the penalty should be, do you think you can do that?

A. Yes.

Q. If the facts and circumstances justified it?

A. Yes.

Q. A yes or no answer—you would answer yes or no irrespective of how you would—you would set aside your feelings about how you thought the punishment should come out?

A. I think so.

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[VD 1558] MS. JAMES: Your Honor, I again object to this question, it's been asked and answered on the first go-around. I think they finally did answer the first time they went around. [VD 1559] She did not think her fact deliberations would be unequivocally——

JUROR WHITE: Well, I don't think—I think that was wrong.

THE COURT: Your objection is overruled.

JUROR WHITE: I think I answered wrong. I think I have got to go back the other way now.

THE COURT: Well, that is what we are trying to find out.

JUROR WHITE: Now, am I making myself clear now?

THE COURT: Well, the reason I go into it is because I think that you originally answered it one way and then answered it a different way, is that right?

JUROR WHITE: I think that is what I did, yes.

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[VD 1562] [By the Court]:

Now, my question is: In deciding and deliberating these fact issues in the case could you give us your assurance that in deliberating on these fact issues that you would not be

affected by the mandatory punishment of death or life imprisonment?

[VD 1563] JUROR WHITE: I could not give you my assurance that I would not be affected.

THE COURT: Okay. Are you saying then it's possible you would be affected, is that a fair statement?

JUROR WHITE: Yes, sir.

THE COURT: Okay. Thank you very much.

Do you submit the juror based on that?

MR. TOKLEY: I challenge for cause.

THE COURT: Now, she is passed to you for further questioning on this issue.

CONTINUED EXAMINATION

BY MS. JAMES:

Q. I'm sorry we have to go over it again but I understood you to say when we asked you at the beginning could you lay your opinion and your feelings aside and answer the questions honestly, I think you said yes?

A. I did but I cannot say yes to that now. That is not—I couldn't lay my feelings aside.

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[VD 2571] CURTIS WILLIAMS

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[VD 2576] [By Assistant district attorney Winfield Scott]

Q. Okay. Can you tell us how you feel?

A. I think a person should be punished if they have done wrong.

Q. What about capital punishment, the ultimate punishment?

A. First, killing another person, killing someone, I don't know about that. I don't know.

Q. Let me ask you this: Are your feelings such that you don't really know how you feel about it?

A. I just don't know how I feel.

Q. All right. Are they such that you really, as you sit there now, don't know whether you could vote [VD 2577] for death or not?

A. I don't know whether I could vote for death or not, I just don't know.

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[VD 2585] Q. (By Mr. Scott) Can you tell us now whether [VD 2586] or not you could ever vote for the death penalty, to your present way of thinking?

A. (By the witness) I don't know.

Q. You don't know, all right. So you can not tell us that your mind is open to it right now, is it?

A. No, it's not.

Q. Some day in the future you might be able to vote for capital punishment——

MS. JAMES: That's leading.

THE COURT: Sustained.

Q. (By Mr. Scott) Do you or not think that maybe some day in the future you may be able to vote for capital punishment?

A. (By the witness) Probably. I don't know.

Q. But not right now?

A. I don't know whether right now——

MS. JAMES: Object, leading.

THE COURT: Sustained.

Q. (By Mr. Scott) How do you feel right now? That's all we want to know.

A. Well, like I said, I believe in punishment.

Q. Yeah.

A. Punishing a person if they've done wrong. But if—taking another person's life—for a life, I just couldn't.

[VD 2587] Q. You couldn't do it?

A. I don't think I could.

Q. You don't think you could ever do it?

A. The way I feel now, I don't think I could do it.

Q. Do you feel that way pretty strongly?

A. Right.

Q. We're talking about right now.

A. Yes.

Q. Do you think the way you feel right now that you'd have to right now, at least, automatically vote against the death penalty?

A. I might, probably.

Q. Is that the way you think you feel?

A. Right.

Q. Okay. And to your—the way you feel now, tell us yes or no, do you feel like that you could never ever vote for the

death penalty right now? Maybe some day, but not right now?

A. Maybe some day, not now.

Q. Right now, you flat could not?

Ms. JAMES: Object, leading.

THE COURT: Don't lead.

Q. (By Mr. Scott) You flat could not, no matter how aggravated the facts, give death?

[VD 2588] A. (By the witness) I don't think I could.

Q. Do you feel pretty strongly about that?

A. Yes, sir.

Q. So when you say you don't think you could, are you saying you flat couldn't? We need a firm answer from you.

A. That's—it's kind of hard to do. It's like saying you can go out there and run in the back of another car, but once you are there——

Q. I know where you are now mentally, not in the future, but right now. Are you not of a frame of mind that you could ever, right now, this moment, ever, no matter how aggravated the facts, give a sentence of death? And you've said you didn't think so. Are you saying 'No, I couldn't' or 'I can't say' or 'Yes, I could'?

A. I don't know.

Q. You don't know?

A. No.

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[VD 2591] Q. (By Mr. Scott) Let me go to 1231. Let me read this to you. It says: "In order to be qualified to serve on the Jury a Juror has to be of the frame of mind that the mandatory punishment of death or life imprisonment will not affect their deliberation on any issue of fact."

Now, if your feelings about capital punishment, about whether or not you could ever give it, would affect you in your deliberations, then you are not a qualified Juror, and that's the end of it.

Is that the way you feel, or am I wrong?

A. (By the witness) Well, like I've told you, if a guy that killed somebody—I can see him receiving a sentence or something like that, but I don't think [VD 2592] I could just—depending on me to say, 'Kill this guy,' I don't think I could do that.

Q. When you say "I don't think" are you saying you couldn't do it?

A. I can't do it.

Q. All right. I think we've finally broken the ice. It doesn't hurt to say 'I can't do something.' I know that's not easy for someone to say. I appreciate your candor. A lot of people feel that way. You're not less of a citizen because you feel that way. There are a lot of things I can't do personally. There's nothing wrong with that.

Are you saying, then, and I know how you feel, but I've got to kind of belabor the point to make it clear to all, are you saying you flat—your feelings right today are such that you could never ever vote in such a way as to sentence a man to his death? You personally.

A. I don't think I could.

Q. You could not or you do not think you could?

A. I don't think I could.

Q. Are you saying, then, that your feelings would affect your deliberations, how you feel about it?

A. Probably.

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[VD 2595] THE WITNESS: If I knew all three questions was going to kill a guy, I don't think I could answer them yes.

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[VD 2596] THE COURT: In other words, a Juror has got to be able to answer the questions yes or no. And what the law will not allow is a person who is on the Jury to go into the jury room and answer those questions with regard to what the—punishment would result.

In other words, if the evidence, to a Jury's mind, says the answers should be yes, then the Juror should be able to write yes. Okay, you know if you answer all three, then he gets death, and you know if you answer any one no, he gets life, right?

THE WITNESS: (Witness nods head, indicating affirmative response.)

THE COURT: Now, if you're on the Jury, would you be able to decide those questions without any regard whatsoever to the punishment that would follow, in other words, about life or death?

Or, on the other hand, would your deliberations be affected—your deliberations on fact issues be affected by the punishment of death or life? Do you understand?

THE WITNESS: Yes, I understand.

THE COURT: What is your answer?

[VD 2597] THE WITNESS: I could answer the questions.

THE COURT: All right, sir. Would you and could you answer all three of those questions yes if the evidence says, to your way of thinking, that the questions ought to be answered yes?

THE WITNESS: That's right.

THE COURT: Even though you realize if you did answer yes that the death penalty is going to come out of that, could you still answer those questions yes? That's what I'm getting at. If you can, you can; if you can not, you can not. We just need to know how you feel.

THE WITNESS: I guess I could answer all three questions yes.

THE COURT: Say you're back in the jury room and found him guilty in capital murder, you're voting on these questions with the other Jurors; and let's say under the evidence you heard that you believe that the right answer to all three of those questions is yes, okay?

THE WITNESS: Right.

THE COURT: You know that if you vote yes on all three questions that his punishment is going to be death; and my question is, under those circumstances would you go ahead and vote yes or [VD 2598] would you be influenced by the death penalty part to keep you from voting yes?

THE WITNESS: I think I would be influenced by the death penalty.

THE COURT: Do you think the punishment of death would affect your deliberations?

THE WITNESS: Yes.

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[VD 2602] THE COURT: Let me ask you again, in your [VD 2603] deliberations on the issues of fact, in other words, those three questions we've talked about, would you be

affected in your deliberations by the punishment of death or life imprisonment?

THE WITNESS: That's right.

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[VD 2692] BOBBIE ANDREWS

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[VD 2697] [By Assistant district attorney Winfield Scott]:

Can you give us a clear unequivocal answer about how you feel about it?

A. (By the Witness) Well, I think I'm in the group that believes in it, but I'm not sure I would want to be a part of administering it.

Q. All you have to tell us, and then you'll be on your way home, you personally could never ever vote for it yourself even though you may personally be for it, if that's the way——

A. I don't believe I could do it.

Q. When you say, "I don't believe I could"——

A. I've never been in this position.

Q. Are you saying you flat could not do it yourself?

A. Yes.

Q. All right. Are you—is there any equivocation on your part? Or are you flat saying, 'I could never, ever do it no matter what the facts or circumstances are. I might be in favor of it as a concept in society, in an abstract sense, but I personally could never do it'?

A. Yes.

Q. No ands, ifs or buts about it?

[VD 2698] A. No.

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[VD 2704] We come back to statutory Article 1231; if you are on this Jury could you give us your unequivocal assurance that the punishment of life or death would not affect your deliberations on any fact issues in this case?

THE WITNESS: I don't believe I could give you my unequivocal assurance.

THE COURT: Are you saying it is possible that the punish-

ment of life or death might affect your deliberation on the fact issues?

(Pause.)

THE COURT: The reason I put it—let me explain it this way: I think very often Jurors fall into one of several categories, 'Yes, I would be affected,' 'No, I would not be affected,' or 'I don't know.' You see?

THE WITNESS: Uh-huh.

THE COURT: I don't know that there's really [VD 2705] anywhere else to fall, but I'm not sure. It's either yes or no or I'm not sure. I'm not trying to limit you, I'm saying this in an effort to find out how you feel.

In other words, to be on the Jury you have to be able to give us the assurance that your answers to fact issues would not be affected—would not be affected by the punishment of life or death.

It would not be right to the Defendant, for instance, if a Juror felt, after hearing all the evidence, 'By golly, he ought to die in the electric chair' and went back there and answered those questions yes to see to it by the answers that he got death. Do you see what I mean?

THE WITNESS: Uh-huh.

THE COURT: Those questions are not geared to letting the Jury manipulate the answers. The answers have to be honest.

Nobody has any quarrel with the way you feel. If you will be affected, not be affected, or you don't know. It's that simple.

So let me give you the question one more time. Would the mandatory punishment of death or life affect your deliberations on any fact issue [VD 2706] in this case?

THE WITNESS: (Pause.) I have to say it would.

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[VD 2708] [By defense counsel James]:

Now, what I'm trying to say, do you mean to say there's no situation, no matter how aggravated, no situation in which the facts could be so vile and aggravating that you could never, ever consider giving the death penalty as the penalty for capital murder?

A. I certainly could consider it. I was just answering his

question. I felt my feelings might enter into it. I do not believe in taking someone else's life.

MS. JAMES: I hope none of us do.

MR. SCOTT: Object to her side bar comment.

THE COURT: Sustained. Ms. James, go ahead with the next question.

MS. JAMES: All right.

Q. (By Ms. James) Now, well, would you share with us the reason why you feel that it might affect your deliberations?

MR. SCOTT: If she knows.

THE COURT: If she knows.

A. (By the Witness) Well, I would feel that I had had a part in being responsible for someone's life being taken.

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[VD 2719] [By defense counsel James]:

Q. Would there be any feeling in your mind that you would automatically always vote against death as a punishment whenever you have formed an opinion that the person on trial is guilty and the offense is capital murder, even though you formed that opinion?

A. Would I automatically vote against it?

Q. Yes.

A. I just said that I was afraid I could not lay aside my feelings. I don't know that I would automatically vote against it.

Q. Regardless of your views on capital punishment, can you render an impartial verdict on whether [VD 2720] the Defendant is guilty or innocent?

A. Well, I don't see how I can answer that question today. Ask it again.

Q. Regardless of your views on capital punishment could you render an impartial verdict on whether the Defendant is guilty or innocent?

A. Well, I said that I'm not sure my feelings would not affect my decisions. So I think that answers your question.

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[VD 2726] THE COURT: Can you assure us that your—can you assure us that the mandatory punishment of death or life imprisonment would not affect your deliberations on any fact issue in this case if you're on the Jury?

THE WITNESS: That's what I said I could not assure you of.

THE COURT: The reason—okay, go ahead.

THE WITNESS: Well, I still feel the same way. I don't understand why she's, you know, trying to put it in a different way so I would answer in a different way.

THE COURT: We come back to the ultimate question——

THE WITNESS: Well, I have given you my answer, but . . .

THE COURT: What I'm asking is your answer, as you said earlier, or is it different, or what?

THE WITNESS: Well, you know, it's hard for me to visualize—I would not want to be dishonest in the way I answered the questions. But my [VD 2727] personal feeling is I don't want to be a part of taking someone's life.

Now, is that—you know, are those two answers not compatible?

THE COURT: I don't want to comment on that, because in the end I have to come back to the statutory question. We can not impanel, under the law, anyone—anybody on this Jury unless and until that Juror can swear under oath that the mandatory punishment of death or life imprisonment will not affect their deliberations on any fact issue in this case.

THE WITNESS: Okay. I can not do that.

THE COURT: You can not swear to that?

THE WITNESS: Right.

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[VD 4443] ANTHONY GUIFFRIDA

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[VD 4448] [By Assistant district attorney Winfield Scott]:

Could you give us your personal convictions, your personal feelings about the death penalty and capital punishment?

A. I think I feel the second group in that respect. Many times I have said that they deserve this or that, but to actually put my hand to it, I don't think I could. I don't think I could.

Q. No quarrel with that at all. Again, I strongly feel that people have a right to feel how they want to in this country, and I have got some strong feelings myself about some of our laws, and if I were on a jury, I'm not sure if I could follow certain of our laws personally.

Again, you can feel one way about a law or the fact that it exists in our society and that there's a need for it, but you also have a right to your feelings. A lot of people feel exactly like you do, and they have no quarrel with the law, but it's just that they personally could never be the one who actually sentences someone to their death.

[VD 4449] A. It's because I feel—well, if it were not something that affected me, maybe I would have a different attitude. I don't know.

Q. You mean if it was someone in your own family?

A. Yes.

Q. Obviously you would not be a proper juror if it involved someone in your own family, but would it be fair to say that if it wasn't someone in your family that you personally would never feel like you personally could ever vote for the death penalty?

A. I really don't know.

Q. Well, then let me explain. There's nothing wrong with not knowing if you're not sure.

Would it be fair to say this. You could not give us the assurance that you would ever be able to vote for death?

MS. JAMES: I ask that he rephrase it, leaving out the double negative.

THE COURT: Overruled.

A. (By the Witness) At this point I really don't know.

• • •

[VD 4452] Q. So as you sit right now, you cannot really assure us that you could ever personally vote for death. Would that be a fair statement?

A. That's true.

Q. All right, and would it, therefore, be a fair statement that because of your feelings about being uncertain, about personally being able to give the death [VD 4453] penalty, am I correct that your feelings would affect the way that you deliberated the case? Your uncertainty at this point?

A. Yes.

• • •

[VD 4456] I think the real problem comes with what we are getting ready to go into. You have said the way you pretty well feel. You cannot assure us that you would ever

in your present position that you do not feel that you could ever vote for death in this case?

A. That's true.

Q. Today?

A. No.

Q. But in the future perhaps?

A. I would say so personally that there's a chance.

Q. Exactly. And now in light of the fact—from what you have said I take it that if you had to answer those three questions, that it wouldn't make any difference to you?

A. It would not.

Q. Because you realize that three yeses would mean death?

A. Yes, I realize that.

[VD 4457] Q. And would I be correct in saying that because of your present feelings that you could not give us any assurance that you would ever personally be able to answer those three questions yes because you know if you do that that would sentence a man to his death. Am I correct about that?

A. Right now, yes.

Q. Right now. In other words, right now because of the way that you feel you could not assure us that you would answer all three questions yes?

A. I don't think at this particular time. I say this particular time.

THE COURT: In your life?

MR. GIUFFRIDA: Maybe six months or a year or so. That I honestly can't say. I honestly feel that I could not give a sentence, or answer some way, where it would commit someone to death. I just don't think I could do it.

Q. (By Mr. Scott) And do you feel pretty strongly about that right now?

A. Right now I do, yes.

Q. And your feelings right now are such that you would have to vote in such a way as to vote——

A. I don't think I could give the death penalty [VD 4458] right now.

Q. Again, is it a matter of knowing nothing for sure?

A. Right.

Q. Fair enough. Now, I think one last thing. Because you are uncertain personally and presently about how you feel,

would it be fair to say that you could not tell us, you could not assure us that your feelings about this automatic death sentence would not affect your deliberations on any issues of fact? In other words, that because of your feelings, I take it that they could affect your deliberations?

A. Uh-huh, yes.

Q. And, therefore, I take it, and you tell me whether I'm right or wrong, I take it in your present way of feeling that you could not state under oath that the mandatory sentence of death or imprisonment, life imprisonment, would not affect your deliberations?

MS. JAMES: I object. He's leading the witness. I object to the way it's raised.

THE COURT: Restate your question.

Q. (By Mr. Scott) From what you told me—you told me—the mandatory penalty of death or imprisonment for life will not affect your deliberations on any issue of fact? From what you have told me, my impression is that [VD 4459] you could not take such an oath, because you don't know how you feel. Would that be fair?

A. That would be fair right now.

Q. Right now, the way you feel is that your feeling about sentencing someone to death could darn well affect your deliberations on any——

MS. JAMES: I object. He's leading again.

A. (By the Witness) I would say so.

• • •

[VD 4461] Except the fact that we are sitting here—but what I'm trying to ask you is, you're saying that you could never on this occasion if you were selected to sit on a jury and the person on trial was found guilty of capital murder that you could never set aside your own personal feelings and follow the law and answer the three questions as questions without considering the offense of the range of punishment? Is that what you're saying?

THE COURT: Do you understand the question?

MR. GIUFFRIDA: Yeah, I think so.

Q. (By Ms. James) What is your answer?

A. I don't think I could actually give it.

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[VD 4492] PENNY L. McDONALD

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[VD 4496] [By Assistant district attorney Winfield Scott]:

Would you tell us how you honestly personally feel?

A. I don't believe in capital punishment.

Q. You don't?

A. No, I don't.

Q. And so you would be in the group that is flat against it?

A. Yes.

• • •

[VD 4497] I take it that your feelings are so strong that you could never vote for the death penalty?

Ms. JAMES: I object. He is leading, Your Honor.

THE COURT: Don't lead.

Q. Could you ever——

A. It would have to be a very serious crime, and I feel that this is no more important than the death of anyone else.

Q. That particular offense, murder of a police officer, is not one of the ones that you personally could ever vote death on?

A. No.

Q. And am I correct, in your way of thinking, in the murder of a police officer, no matter how aggravated the facts were, you personally could never vote for death?

A. It would have to be very aggravated. I would have to be thoroughly convinced that it was a very, very aggravated act.

Q. Let me go back to square one.

You told us that you were against the death penalty.

A. Yes.

[VD 4498] Q. Well, are you against it but in some cases you could give it or are you just flat against it?

A. I couldn't give it in some cases.

Q. And you say that the murder of a police officer is or is not one of the kinds of cases that you might be able to give?

A. Well, it could be.

Q. Now, when you say very, very aggravated, you understand this indictment does not allege the murder of a squad car full of police officers or a police station full of police officers. It alleges the murder of one police officer.

Now, I don't know—I'm trying to sort of probe around and determine what you mean by being very, very aggravated. Do you mean a multiple murder?

A. No.

Q. It does not have to be murder of one police officer?

A. Yes, it could.

• • •

[VD 4506] THE COURT: I'm sorry. When you say you're against capital punishment, are you saying that you're against it period, or are you against it in most cases or I don't quite understand what you're saying.

Ms. McDONALD: I'm against it as far as ever being personally concerned with it. Reading the paper or reading anything—I'm against it as far as that goes.

THE COURT: Well, are you saying that even though you're against it, since it is a law, that you could serve on a jury and vote for it if the facts were proper?

Ms. McDONALD: Yes, I could.

Q. (By Mr. Scott) I understand your position now. It's a matter of the facts and circumstances and if the proper facts came along to your way of thinking, you could vote for death?

A. Yes, I could.

• • •

[VD 4529] Q. (By Mr. Scott) Would your feelings affect the way that you deliberated the issues of fact in the case?

A. Yes, I think anyone's feelings would.

[VD 4530] Q. I'm not arguing with that. Would the mandatory sentence of death or life affect your deliberation on the issue of guilt or innocence?

A. Not the guilt or innocence. If the man is guilty, he's guilty, and the next step is the next step.

Q. You say it would on the three questions?

A. Might. I don't know. Like I said before, I would have to hear all of the circumstances and all of the facts. I think anyone who sat back there, even they told you emphatically—would inject their own feelings.

• • •

[VD 4535] In other words, would the question of life or death affect your deliberations on the fact issues in the case?

Now, if you can assure us of that, that would not affect your deliberations, then you are qualified. If you cannot give us that assurance, you are not qualified. Does that help you understand?

Ms. McDonald: I don't know if I could find him guilty unless the circumstances, evidence, you know, was right—I could do it if I felt strongly about it.

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[VD 4542] Q. We need to know how you feel now, not how you might feel. In other words, are you in a frame of mind right now where if you were convinced he is guilty, you would find him guilty, and if you're convinced the answer to the three questions should be yes, even though by answering them yes, you know he is going to get death, and you don't think he ought to get death, what would you do?

A. I wouldn't answer the three questions yes unless [VD 4543] I felt he deserved death from the facts, and I can't consider the facts until I have heard them, and then I might change my mind. I can't say what I would do until I know the facts.

Q. Would you, if you thought the facts meant the questions should be answered yes, and yet your feelings told you he should not get death, would your conscience require you to misanswer one of the questions?

A. No.

Q. So you would set aside your conscience?

A. Yes, I would.

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[VD 4550] Q. (By Mr. Scott) We got so balled up in this other thing that I never got back to the oath.

You understand that we, as prosecutors, have to disqualify jurors if he or she states under oath that the mandatory sentence—life imprisonment, or death; will not affect his or her deliberations on any issue of fact.

Now, are you able to give us that assurance now?

A. I don't know. I don't know. It goes back to so many things. I don't know if I can.

[VD 4551] The Court: Do you have reservations in your mind about it?

Ms. McDonald: Yes, I have a reservation about my ability.

Q. (By Mr. Scott) So at this point, you're not prepared to take such an oath?

A. No, I don't want to.

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[VD 4552] Q. (By Ms. James) I think you answered—well, [VD 4553] you said several things. You answered that in the guilt or innocence phase that it would depend on the facts and circumstances, but that you could, in a proper case, vote for the death penalty, if the facts and circumstances require the answer to be yes to those questions.

A. Yes, I could.

Q. All right, then there is no question in your mind that you could do it?

A. Right now there is not, but I don't know about when I get back there and about when I have heard all of the facts.

Q. Well, you see, we are not asking you to commit that yes, I will vote yes on the answers. We are not asking you to vote yes or no.

All I'm asking is that if the three questions arise in the course of the trial, can you vote?

A. Yes.

Q. And you can vote about the death penalty or the life sentence, whatever?

The Court: Don't lead the juror. Rephrase your question.

Q. (By Ms. James) It would not affect, I take it, from your answer that it would not affect your deliberations in the guilt or innocence phase of the trial? If you will give us that assurance——

[VD 4554] Mr. Scott: I object. Leading.

The Court: Sustained.

Q. (By Ms. James) The question is, would it or would it not affect your deliberations on the guilt or innocence phase of the trial? Or on the answer to the three questions as questions—as individual questions, if you knew that the penalty was either life or death.

A. I don't think that it would.

Q. Is it a possibility?

A. I can't be any more specific. I don't know until I get back there. I don't think that it would. Right now it wouldn't. Right now I can say that. If the prosecutor proves

it to me beyond a reasonable doubt—beyond a shadow of a doubt then I will find him guilty. If I will answer them yes, that will be that. That's the way I feel right now.

Q. I'm not asking you to prejudge about what the facts and circumstances that might come up. We can't do that. We can't suggest that.

Right now, can you or can you not take the oath that you would not be affected——

A. (interposing) I don't know. I don't know that I can give you that oath. That's just what I told Mr. Scott. I dont' know.

I know right now I feel like if the facts were [VD 4555] right, I could do it.

I don't know how I'm going to feel after I've heard the facts.

Ms. JAMES: I submit she is qualified.

THE COURT: Do I understand that what you're saying is that you cannot assure us that you cannot give us your assurance under oath that the man's punishment, life or death, would not affect your deliberations on the fact issues in this case?

Do I understand what you're saying, is that you're not able to assure us of that?

Ms. MCDONALD: Right now I could, but I don't know if that would hold up when the time came, and I don't want to give my assurance. I don't want to put the Court in that position.

THE COURT: Can you assure us that on the mandatory punishment of death or life, will not affect your deliberations on the fact issues in the case?

Ms. MCDONALD: Not in the future I can't.

THE COURT: In other words, you can't give us your assurance now, and say, next week [VD 4556] or the week after that when you're deliberating this case, that you cannot now assure us that you will not be affected in deliberating upon the fact issues; that the maximum punishment would not affect your deliberations? Is that what you're saying?

Ms. MCDONALD: That's correct.

Ms. JAMES: May I respectfully object to the Court's leading interrogation, and I would further like to question the juror some more.

Q. (By Ms. James) Now, I'm not asking you to foresee

everything that you might do in the future, but I would like to know whether or not—of course, you do not know your own mind sufficiently to be very certain of what—in fact, absolutely certain. This you do or do not know. Of course, you do not know about decisions you might make in the future.

You understand that I'm not asking you to prejudge a case. I'm asking you to tell me what you know that you would be able to do. Even though it might be a week or two before we get to that point.

I think we understand each other now.

We are having semantic problems now.

MR. TOKLEY: I object to Ms. James' [VD 4557] narration of "semantic problems".

THE COURT: Overruled.

A. (By the Witness) I don't know if I could do it in two weeks, a month, or three weeks. After being subject to the testimony and the facts, I don't know. I can't take an oath today saying that I will. I won't take an oath saying that I will.

Q. That's because I gather that you're being very careful before you actually commit your ability to take an oath at this point. I don't know what might happen in the future. Facts and circumstances might arise, but I'm not asking you to just imagine any situation. I'm asking you what frame of mind that you're in right now? You know your own stability. Are you stable sufficiently enough to be able to assure us that your deliberations would not be affected, as you have stated they are right now?—Unaffected by anyone?

A. I can't say they won't be affected in two weeks, if it gets that far to the punishment. I can't say. I can't tell the prosecutor that yes, I will, without a doubt in my mind, if I find him guilty, and I answer those three questions yes, I will say yes, he should go to the electric chair, and I can't tell you that I won't do it.

• • •

[VD 4559] Q. (By Ms. James) Can you take an oath——

A. (interposing) I can take an oath. I can't take that oath and be honest about it. I can take an oath and do what I want to do. I can't take an oath and tell y'all that I'm going to knock out the whole fact that the death penalty is involved

in it, because I don't know when I get there. I don't know the facts or anything. The facts may prove that I could do it, and I would do it and vote for the death penalty.

[VD 4560] Q. To keep an open mind, that's all we are really asking you to do.

A. You're asking me to take an oath, and I can't take an oath.

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[VD 4563] [By defense counsel James]:

it's my understanding that you have said several times that you could answer the questions independently of any feelings that you might have at this time about the death penalty or life imprisonment?

A. Right now, I don't—I don't know.

I cannot take an oath that I will do that, and I can't do that. I just can't.

I just don't feel that strong. I don't feel that strongly about it. I just don't think I can take an oath. I can't take an oath and really sit back there and do that.

• • •

[VD 4566] Q. (By Ms. James) That's what I'm attempting to do. The statute says the prosecutor should inform the jury that a juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact. That means answers to questions. It does not mean your feelings.

A. My feelings could affect the way that I answer the questions. My feelings could answer the way that I interpret the evidence, and I don't know what my feelings are going to be.

I cannot take an oath and say my feelings will not be affected as to what happens.

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[VD 4567] [By defense counsel James]:

And then after you have listened to all of the evidence and made a decision as to the guilt or innocence, then, and only then, could you answer the three questions, after you have heretofore laid your own feelings, [VD 4568] your preconceived feelings about the mandatory sentence?

A. I don't know that, and because I don't know I cannot take an oath saying that I will. That's what the prosecutor wants. I can't give that oath. I can't give anybody that oath. I can't honestly say that. I could say that I could raise my hand and take the oath, but to get back there, I know that it would affect me.

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[VD 4920] DOROTHY G. RIDDLE

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[VD 4922] [By Assistant district attorney Steve Tokley]:

Now, I want to ask you, knowing all of that, I want to ask you what are your feelings about the death penalty?

A. Well, I feel like—if I felt like, myself, that, you know, would justify what he's done that I probably could.

Q. You probably could?

THE COURT: Would you pull that microphone up a little higher? Thank you.

[VD 4923] Well, that's all right. Okay.

JUROR RIDDLE: Okay. I'm sure I know—at the same time—but I just feel—I don't know how to answer it except that I could, I'm sure, if I felt like it was—

Q. (By Mr. Tokley) Let me put this on a real personal basis to you. Try to put it in the light that it would be in. I think the question really boils itself down to if—could you sit on this jury and if you found the Defendant guilty as charged, could you make decisions that, if the facts and circumstances called for it, would result in this man's death. That's what it really boils down to. We have to know now whether you could or you couldn't.

Ms. JAMES: Your Honor, I object to the phraseology of, resulting in this man's death.

THE COURT: Overruled.

Q. (By Mr. Tokley) Go ahead.

A. Yes.

Q. Do you have any doubt about that at all?

A. No, after listening to it, I'm sure I could.

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[VD 4925] May I assume then—may I take it from that answer that you don't have any quarrel with the death penalty?

A. No.

Q. You believe in the death penalty?

A. Right.

Q. But you just personally could not sit on a jury yourself and be involved in making decisions that would result in the death penalty. Am I correct in that?

A. Well, I think after hearing a case or going through it, I could. Just at the moment it's just such a big decision for me to say yes or no to.

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[VD 4928] You tell me how you feel at this point.

A. Well, I guess I feel that I do believe in it,

Q. Sure.

A. But, of course, the way I feel right now—it would be a big—it would be hard for me to do it, and then I wonder how I would feel afterwards.

Q. Some people it would just—some people it would just—it would just violate their conscience.

A. Uh huh.

Q. And this we don't want to do, and that would be unfair to you and it would be unfair to those of us who participated in the case, certainly unfair to the Defendant.

So, I just—I will ask you the question again. Do you feel like that you could personally serve on this jury, and if the facts and circumstances [VD 4929] called for it, make decisions, personally make decisions that would result in this man's death?

A. I would just say no.

• • •

[VD 4933] Q. Now, I just want to ask you based upon the reservations that you have indicated about even though you—even though you have no quarrel with the death penalty, you have indicated that as far as your personal service was concerned you don't feel like you could do it? Would the mandatory sentence of death or life affect your deliberations on any of the fact issues of the case?

A. I don't think after going that far and hearing all the evidence that if I felt like all the answers should be yes, I don't think it would,

[VD 4934] Q. All right. You say you don't think that it would? Let me just tell you what the Statute requires. I

will just—in no uncertain terms—to be qualified to serve on the jury like this you have to be able to assure us in no uncertain terms that the mandatory sentence of death or life would not—not probably wouldn't or might not, but would not affect your deliberations on any of the fact issues in the case.

Now, either you can tell us that or you can't tell us that, and this is where you have to let us know, and if you have serious reservations about it then you need to let us know that. But can you unequivocally tell the Court and the lawyers that the mandatory sentence of death or life will not affect your deliberations on any of the fact issues of the case? Can you say that under oath or can you not say that?

A. That would not affect me. That—I would say yes, I could do that after all the—

Q. You are saying that the mandatory sentence of death would not affect you?

A. No.

Q. Okay. Are you sure about that?

A. Yes.

Q. Okay. You are sure about that in spite of [VD 4935] the reservations that you earlier had?

A. Yes.

Q. So, you are saying then, that if you were selected on this jury and if you were convinced that the Defendant was guilty and if you were convinced that the evidence indicated that the proper answer to the three questions was yes that you could answer all three questions yes knowing full well that it would result in this man's death. Can you tell us that?

A. Yes, until you said it that way.

Q. That's the way it is. We are not talking about in the abstract. We are not talking about some philosophical solution.

A. I know it.

Q. We are talking about a real live case and real life decisions that could, if the facts and circumstances called for it, result in a real person's death. And don't feel like—don't feel like you have to prove something to yourself or to us by saying I can do it.

A. Yeah.

Q. If you honestly feel like you can't do it, then you are a much better citizen for telling us than leading yourself

and leading us to think that you can and then having these horrible doubts that linger all [VD 4936] the way through the trial.

MS. JAMES: I object to this tutoring of the witness. I think she expressed her views very adequately and unequivocally.

THE COURT: Overruled.

MS. JAMES: And that she's qualified.

THE COURT: You are overruled.

Q. (By Mr. Tokley) Okay.

A. I will say no just like the first time.

Q. Okay. So, then—and I'm not trying to get you to do something, but I'm trying to put you in the situation that you are really in and I feel like it's out of fairness to you that I'm doing that as much as for us.

A. Yes, I understand that.

Q. Are you saying that the mandatory sentence of death or life would affect your deliberations on the fact issues in the case?

A. Yes.

Q. Is that what you are telling us?

A. Yes.

Q. All right. Now—

MS. JAMES: Leading, Your [VD 4937] Honor. The question was leading.

THE COURT: Overruled.

Q. (By Mr. Tokley) Mrs. Riddle, I know you are struggling with this, and I appreciate your honesty and I appreciate your frankness, but is that really the way you feel when it gets down to it?

A. Yes, sir.

Q. You simply could not tell us under oath that the mandatory sentence of death or life would not affect your deliberations?

MS. JAMES: Leading, Your Honor.

A. (By Juror Riddle) No, I could not tell you that.

THE COURT: Overruled.

Q. (By Mr. Tokley) Because it would—

A. Yes.

Q. Are you sure about that?

A. Yes.

• • •

[Rec. 163]

JUDGMENT—PLEA OF NOT GUILTY

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
vs.	COURT NO. 2 OF DALLAS COUNTY,
RANDALL DALE ADAMS	TEXAS
	APRIL TERM, A.D., 1977
	No. F-77-1286-I
	April 26, 1977

THIS DAY this cause was called for trial, and the State appeared by her Criminal District Attorneys Douglas Mulder, Stephen Tokoly and Winfield Scott, and the Defendant RANDALL DALE ADAMS appeared in person, his Counsel Edith James and Dennis White also being present, and both parties announced ready for trial, and the said defendant in open Court after having been duly and legally arraigned pleaded "Not Guilty" to the charge contained in the indictment herein; thereupon a jury, to-wit: Mrs. Douglas Fain, foreman, and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charged of the proper officer to consider their verdict, and afterwards were brought into open Court, by the proper officer, the Defendant and his counsel being present, and [Rec. 164] in due form of (*sic*) returne (*sic*) into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

> "We, the jury, find the defendant guilty of Capital Murder, as charged in the indictment."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

Thereupon further evidence being heard by the jury on the special issues pertaining to punishment the Court again charged the jury as provided by law on the following special issues: Special Issue I: "Was the conduct of the defendant that caused the death committed deliberately and

with the reasonable expectation that the death of the deceased or another would result?"

Special Issue II: "Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?"

Special Issue III: "Was the conduct of the defendant in killing the deceased unreasonable in response to provocation, if any, of the deceased?"; and the jury after hearing argument of counsel, retired in charge of the proper officer to consider their verdict and afterwards were brought into open Court by the proper Officer; the Defendant and his counsel being present and in due form of law returned into open Court the following verdict, which was received by the Court and is here and now entered upon the minutes of the Court, to-wit:

> We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue I is "yes."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

> We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue II is "yes."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

> We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to Special Issue III is "yes."
>
> */s/ Mrs. Douglas Fain*
> *Foreman*

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, that the said Defendant is guilty of the offense of Capital Murder, A Capital Felony, as charged in the indictment; and that the said defendant committed said offense on the 28th day of November A.D., 1976; as found by the jury, and the jury having answered "yes" to the [Rec. 165] three Special Issues, the Court set the punishment at Death; and that the State of Texas do have and

recover of the said Defendant all costs in this prosecution expended, for which execution will issue; and that the said Defendant is remanded to the Sheriff of Dallas County to await the further order of the court herein.

D. MITWAY
Judge, Criminal District Court No. 2
Dallas County, Texas

WHEREAS, on the 20th day of May, 1977, the Defendant, RANDALL DALE ADAMS in said cause, gave notice of appeal to the Court of Criminal Appeals at Austin, Texas.

Filed in the Criminal District Court No. 2 of Dallas County, Texas, on April 26, 1977.

/s/ D. Metcalfe

COURT OF CRIMINAL APPEALS OF TEXAS,
En Banc.

RANDALL DALE ADAMS, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee.*

No. 60037.

Jan. 31, 1979.

Rehearing En Banc Denied

March 21, 1979.

Defendant was convicted in the Criminal District Court, No. 2, Dallas County, Don Metcalfe, J., of capital murder, and he appealed. The Court of Criminal Appeals, Dally, J., held that: (1) trial court did not err in refusing to admit evidence of extraneous criminal offenses committed by State's chief witness; (2) prosecutor did not improperly withhold statement made to police by witness; (3) trial court did not erroneously refuse to permit defendant to ask venire members certain questions during voir dire, and (4) evidence was sufficient to support jury's affirmative answer to second punishment issue.

Affirmed.

Melvyn Carson Bruder, J. Stephen Cooper and George A. Preston, Dallas, for appellant.

Henry Wade, Dist. Atty., W. T. Westmoreland, Jr., Douglas D. Mulder and Winfield Scott, Asst. Dist. Attys., Dallas, for the State.

Before the court en banc.

OPINION

DALLY, Judge.

This is an appeal from a conviction for capital murder. The punishment was assessed at death.

Appellant's brief contains forty grounds of error in which he contends that: (1) the trial court erred in refusing to

admit evidence of extraneous criminal offenses committed by the State's chief witness, David Harris, and in restricting appellant's cross-examination of another State witness, Teresa Turko; (2) the prosecutor improperly withheld a statement made to the police by witness Emily Miller; (3) the trial court erroneously refused to permit appellant to ask venire members certain questions during voir dire, and excused some venire members for cause in violation of the rule of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (4) Art. 37.071, V.A.C.C.P., is unconstitutional; and (5) the evidence is insufficient to support the jury's affirmative answer to the second punishment issue.

Appellant was found guilty of the murder of Dallas police officer Robert Wood, who was fatally shot by the driver of an automobile he had stopped for failing to have on its headlights. The shooting occurred at approximately 12:30 a.m. on November 28, 1976, in the 3400 block of North Hampton Road in Dallas.

The State's principal witness was David Harris, who at the time of the offense and trial was sixteen years of age. Harris testified that he ran away from his home in Vidor on November 26, 1976, after stealing money and a car from the house of a neighbor. He also took with him a .22 caliber pistol and ammunition.

Harris drove to Houston, where he spent the night in a shopping center parking lot. On the morning of November 27, Harris drove to Dallas. In Dallas, Harris picked up appellant, who was hitchhiking. Harris and appellant spent the afternoon and evening of November 27 riding around Dallas in the car Harris had stolen, smoking marihuana and drinking beer. That night they went to a drive-in movie.

Harris and appellant left the movie at approximately midnight. Appellant was driving. As they drove south on the street Harris later identified as Hampton Road toward the motel at which appellant was living, they were stopped by a police patrol car. Harris, fearing that he would be identified, slumped down in the front seat so that he would not be seen. As the officer, Robert Wood, approached the driver's window of the car, appellant reached under the front seat where he knew the pistol was located, removed

the pistol, shot the officer several times, and rapidly drove away.

After the shooting, appellant drove to his motel, where he and Harris separated. Harris spent the rest of the night in a parking lot, and then returned to Vidor. Harris spent the next several days with friends, to whom he stated that he had shot a Dallas police officer. Harris testified that he made this claim in an effort to impress his friends. Harris was arrested on December 5, 1976, for the theft of the car and was released to the custody of his parents. He was rearrested on December 20, after the Vidor police learned of the incriminating statements he had made with regard to the Dallas murder. Following this arrest, Harris gave a statement detailing his activities in Dallas and identifying appellant as the person who shot Wood.

Appellant, in his testimony, admitted spending the day of November 27 with Harris. But appellant claimed that he and Harris left the movie at approximately 9:30 p.m. and that they separated at a convenience store next door to his motel. Appellant testified that he returned to his motel room no later than 10:00 p.m. and was asleep there at the time of the murder. Appellant's defensive theory was that Harris had shot Wood and was attempting to shift the blame to him.

Pursuant to a motion in limine filed by the State and granted by the trial court, evidence concerning extraneous offenses committed by Harris was first elicited outside the presence of the jury in order that a determination as to its admissibility could be made. Through Harris' own testimony and that of other witnesses, it was established that Harris had committed several burglaries and a car theft during 1975. It was also established that Harris had been adjudicated a juvenile delinquent following another burglary in April, 1976, and was on juvenile probation at the time of appellant's trial. The trial court ruled that this testimony was admissible, and it was subsequently introduced before the jury. However, the trial court refused to permit the introduction of testimony concerning a burglary and a robbery committed by Harris on December 4 and 5, after his return to Vidor from Dallas. We shall hereafter refer to these offenses as the "December offenses."

Testimony concerning the December offenses was elicited

from five witnesses. Harris admitted participating in both offenses. Lynn Brown and Randy Hayes, two of the friends with whom Harris was staying at that time, also testified that Harris committed these offenses. Jim Sharon Bearden, the County Attorney of Orange County, and James Jenkins, the Assistant County Attorney, testified that offense reports had been filed in their office with respect to these offenses and that a petition to revoke Harris' probation had been prepared but not filed. Bearden and Jenkins also stated that no decision had been made whether to prosecute Harris as an adult for the offenses. Appellant contends that this testimony was admissible to establish Harris' bias and motive for testifying against appellant.

In general, unadjudicated criminal offenses may not be used to impeach a witness in a criminal case. Art. 38.29, V.A.C.C.P. However, evidence of pending charges against a witness is admissible under certain circumstances for the limited purpose of showing bias, prejudice, interest, and motive of the witness in testifying as he did. *Randle v. State,* 565 S.W.2d 927 (Tex.Cr.App.1978); *Castro v. State,* 562 S.W.2d 252 (Tex.Cr.App.1978); *Evans v. State,* 519 S.W.2d 868 (Tex.Cr.App.1975); *Kissinger v. State,* 126 Tex.Cr.R. 182, 70 S.W.2d 740 (1934). See also *Simmons v. State,* 548 S.W.2d 386 (Tex.Cr.App.1977). Appellant argues that the failure of the Orange County authorities to take any action against Harris based on the December offenses affords the basis for an inference that a bargain had been made with Harris in exchange for his testimony. See *Burkhalter v. State,* 493 S.W.2d 214 (Tex.Cr.App.1973).

An examination of the record reveals that appellant failed to preserve error with respect to the testimony of Bearden and Jenkins. After questioning both witnesses outside the presence of the jury, as required by the motion in limine, appellant failed to secure a ruling by the trial court on the admissibility of their testimony regarding the December offenses. Appellant may not complain on appeal of the exclusion of testimony in the absence of an offer of the testimony and a ruling by the trial court excluding it from evidence. *Norman v. State,* 523 S.W.2d 669 (Tex.Cr.App. 1975); *Duran v. State,* 505 S.W.2d 863 (Tex.Cr.App.1974).

Appellant did obtain rulings from the trial court excluding from evidence the testimony of Harris, Brown, and

Hayes concerning the December offenses. However, in arguing for the admission of their testimony, appellant's trial counsel did not raise the contention now made on appeal. The contention made before the trial court was that the evidence concerning the December offenses showed that Harris was on a criminal spree during the time period in question, and that Harris had a propensity to blame others for his own criminal conduct. The following excerpt illustrates the argument made by appellant's counsel:

"THE COURT: Mr. White, I would like to know now, not talking about his criminal activities prior to the shooting of the police officer, I would like to know how the later commission of a burglary and a robbery by [Harris] is material to this case?

"MR. WHITE: Your Honor, I believe that our defense being that this witness—well, by his own witness is an accomplice but—that it will—that he is the perpetrator of the crime and I believe that the evidence will show he was on a criminal spree and he was committing one crime after the other.

"THE COURT: In other words, you want to show he is a criminal generally, is that right, is that it?

"MR. WHITE: Not just a criminal generally, but it's the specific time span from November 26th to December 19th that he was on a criminal spree committing a series of related crimes.

* * * * * *

"MR. WHITE: I believe that I have elicited from this [witness] that in relation to the burglary that he was the one that went into the residence, to the trailer and yet upon his arrest he implicated Frank Nelson, Hootie Nelson and Lynn Brown who were not people that went into the residence.

"That in the commission of the robbery he held the rifle, went inside the convenience store, committed the robbery and yet upon his being arrested and giving a statement he implicated two other participants that were not directly—

"THE COURT: It's—

"MR. WHITE: He has a propensity of committing crimes and blaming it on the closest person at hand."

Not only did appellant fail to urge the admission of the December offenses on the ground now urged before this

Court, he made no effort to pursue the question of Harris' bias and motive during the trial. The fact that Harris was on juvenile probation was in evidence. It was also established that by stealing his neighbor's money and car and leaving Orange County Harris had violated the terms of his probation. It was also apparent from Harris' description of the events of December 27 and 28 that he was a prime suspect in Wood's murder. Despite the presence of this evidence, appellant did not cross-examine Harris with regard to the existence of any agreement he may have had with the State, nor was Harris asked any questions regarding his motive for testifying against appellant. Appellant did not call County Attorney Bearden to testify before the jury, and in his questioning of Assistant County Attorney Jenkins, appellant made no inquiry into the existence of any understanding between his office and either appellant or the Dallas District Attorney.[1] We hold that the refusal of the trial court to admit testimony concerning the December offenses was not an abuse of discretion in light of appellant's failure to inform the trial court that the testimony was sought to show bias or motive, and the absence of any attempt by appellant to show that Harris' testimony had been prompted by the promise or hope of favorable treatment. *Cloud v. State,* 567 S.W.2d 801 (Tex.Cr.App.1978); *Garza v. State,* 532 S.W.2d 624 (Tex.Cr.App.1976); *Luna v. Beto,* 395 F.2d 35 (5th Cir. 1968).

Officer Teresa Turko was Wood's partner. Turko testified that she was standing near the right rear corner of the assailant's car at the time Wood was shot and that she saw only one person in the car. Turko could not identify this person since she saw only the back of his head, but she did testify that appellant's hair was the same color and worn in the same style as that of the man in the car. Turko also testified that Harris' hair was not similar in either color or style to that of the man she saw.

Outside the presence of the jury, Turko testified that an internal affairs investigation of her conduct on the night of the shooting was conducted by the Dallas Police Department after questions were raised as to the truthfulness of

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[1] Harris, Bearden, and Jenkins each testified, in response to questions by the prosecuting attorney outside the presence of the jury, that no promises or agreements had been made by the State in exchange for Harris' testimony.

her original report. Although she was not formally suspended, Turko was relieved of her duties for ten days while this investigation took place. As a result of the investigation, the charges against Turko were determined to be unfounded.

The trial court initially granted the State's motion in limine prohibiting appellant from introducing evidence of the investigation of Turko's conduct. Appellant contends that the trial court erred by restricting his cross-examination of Turko in this manner. However, during appellant's cross-examination of Turko, the following exchange took place relative to the report Turko had filed pursuant to the investigation:

"Q. Did you make a further statement in connection with the Police Department investigation of the killing of Robert Wood?

"A. Yes, sir, I did.

"Q. Was that statement made by you on the 9th day of December, 1976?

"A. Yes, sir.

"Q. Did you state at the beginning of that affidavit that 'I will also cover the additional allegations that have been surfaced since the shooting incident'?

"A. Yes, sir.

"THE COURT: Let me see you around the side of the bench, Mr. White, Mr. Mulder.

* * * * * *

"MR. MULDER: He can put the whole thing in as far as I'm concerned. I don't want to argue about it any more. He can put the whole thing in.

"MR. WHITE: I'm in agreement that parts of this are appropriate and parts are not. I would like to examine which parts are appropriate.

"THE COURT: Go ahead with your questions.

"MR. WHITE: I would like to take a few moments and—

"MR. MULDER: Judge, I don't have any objection to it and don't have any motion. As far as I'm concerned he can put the whole thing in.

"THE COURT: Are you offering the whole thing?

"MR. WHITE: No, I'm not, I'm not, Your Honor. I'm trying to abide by the terms of previous motions.

"THE COURT: What is it you want to do now, Mr. White?

"MR. WHITE: I'm trying to get Mr. Mulder to identify parts that comply with his motion. I'm going to introduce those parts only.

"THE COURT: Well—

"MR. MULDER: I'm withdrawing any motions, you can put anything you want to put in.

"THE COURT: He said he is—

"MR. MULDER: I'm withdrawing that. Put it all in if you want to."

Despite the withdrawal of the State's motion in limine, appellant did not question Turko concerning the internal affairs investigation. Although appellant was given the names of the officers who conducted the investigation, he did not call these officers as witnesses. We hold that the failure of appellant to offer evidence concerning the internal affairs investigation after the State withdrew its motion in limine waived any objection he might have had to the initial exclusion of this evidence. *Jackson v. State,* 552 S.W.2d 798 (Tex.Cr.App.1976); *Johnson v. State,* 527 S.W.2d 525 (Tex. Cr.App.1975).

Three witnesses testified that they drove past the scene of the shooting after the assailant's car had been stopped but before Wood was shot. Emily and Robert Miller testified that they saw only one person in the suspect car and identified appellant as that person. Michael Randall testified that he saw two people in the suspect car and identified appellant as the driver.

Each of these witnesses gave a written statement to the police soon after the shooting. In Emily Miller's statement, she describes the assailant as "a Mexican or a very light skinned black man." Appellant contends that, since he is neither black nor of Mexican descent, this prior statement was relevant to the issue of Emily Miller's credibility and that the prosecutor improperly withheld the statement in violation of the rule of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Appellant learned of the existence of Emily Miller's statement when, three days after she testified and after appellant had waived her further appearance, appellant's trial counsel asked the prosecutor to see the written statements of the three identification witnesses. At this point in the trial, both sides had rested and Emily Miller had moved to an

unknown address believed to be in Illinois. Given the uncertainty as to whether and when Emily Miller could be located the trial court refused appellant's request to introduce her statement into evidence.

Prior to trial, appellant filed a motion for the disclosure of evidence favorable to the accused in which he requested, among other things, the statements of witnesses. Appellant contends that the failure of the prosecutor to comply with this motion with respect to Emily Miller's statement denied him due process of law, citing *Crutcher v. State,* 481 S.W.2d 113 (Tex.Cr.App.1972). In *Crutcher,* a burglary conviction was reversed because of the failure of the prosecutor to reveal a police offense report that contained a description of the burglar by the State's chief identification witness. This description was basically inconsistent with the appearance of the defendant. We held that the existence of this inconsistent description was relevant to the witness' credibility and that the prosecutor violated his duty under *Brady v. Maryland,* supra, when he knowingly failed to reveal the existence of the offense report despite an attempt by the trial court, at the hearing to determine the admissibility of the witness' in-court identification, to determine if there were any discrepancy between the witness' description of the burglar and the actual appearance of the defendant.

A defendant is entitled to examine the written statement of a witness for purposes of cross-examination upon demand made *after* the witness has testified on direct examination. *Gaskin v. State,* 172 Tex.Cr.R. 7, 353 S.W.2d 467 (1961). The distinction between the general *Brady* rule and the more specific *Gaskin* rule was discussed in *Rayne v. State,* 516 S.W.2d 675 (Tex.Cr.App.1974), in which the defendant complained of the prosecutor's failure to disclose the statements of the State's witnesses prior to trial:

"Reliance is primarily made on *Brady v. Maryland,* [supra], which is limited to suppression of exculpatory evidence by the prosecution to an accused upon request as being a violation of due process. Several federal jurisdictions favor pre-trial disclosure of evidence subject to the *Brady* doctrine. [Citations omitted.] Despite the announced policy in these federal jurisdictions, the legislative policy of Texas is to the contrary. Art. 39.14, V.A.C.C.P., specifically excepts written statements of witnesses from pre-trial discovery. We do not feel compelled to expand upon the rule

followed in this State since the procedure of disclosing such evidence at trial affords the appellant an opportunity to request a postponement or continuance which adequately satisfies due process requirements of *Brady v. Maryland,* supra."

A defendant is entitled to examine the prior statements of a State witness only if he makes a timely and specific request to do so following the witness' direct testimony. *Mendoza v. State,* 552 S.W.2d 444 (Tex.Cr.App.1977); *Zanders v. State,* 480 S.W.2d 708 (Tex.Cr.App.1972); *Gaskin v. State,* supra. Appellant did not request to see Emily Miller's written statement until three days after she had testified. This was not a timely request, and appellant may not complain of the failure of the prosecutor to disclose the statement earlier.

Emily Miller was one of three identification witnesses. Her statement describing the suspect as a black or Mexican man was based on having seen the assailant for a few seconds as she and her husband drove past the scene. This is in contrast to *Crutcher v. State,* supra, where the sole identification witness had had a face-to-face conversation with the burglar and had soon thereafter given the police a detailed description which did not fit the defendant. The record also reveals that Emily Miller positively identified appellant in both a lineup and a photographic display. After examining the entire record, we cannot say that Emily Miller's written statement creates a reasonable doubt as to appellant's guilt. See *Frank v. State,* 558 S.W.2d 12 (Tex.Cr.App.1977); *Smith v. State,* 516 S.W.2d 415 (Tex.Cr.App.1974).

Appellant contends that the trial court erred by restricting his questioning of certain venire members, thereby preventing him from using intelligently his peremptory challenges. The necessity to question freely and broadly on voir dire in order to decide intelligently when to use one's peremptory challenges has been firmly established as a concomitant to the constitutional right to counsel. *Smith v.* State, 513 S.W.2d 823 (Tex.Cr.App.1974); *De La Rosa v. State,* 414 S.W.2d 668 (Tex.Cr.App.1967). Although the decision as to the propriety of any question during voir dire is left to the discretion of the trial court, that discretion is abused when a proper question about a proper area of

inquiry is prohibited. *Smith v. State,* supra. There is no doubt, however, that reasonable restrictions on the exercise of voir dire examination may be imposed for various reasons, among them to curb the prolixity of what can become the lengthiest part of a criminal proceeding. *Bodde v. State,* 568 S.W.2d 344 (Tex.Cr.App.1978); *Smith v. State,* supra. In the instant case, jury selection began on March 28, 1977, and did not end until April 25, after the examination of more than one hundred venire members. The transcription of the voir dire examination fills more than 5,700 pages of the record.

Appellant raises three grounds of error regarding his examination of Mrs. Willie Millhollon. The first is based on the following exchange:

"Q. (By Ms. James) All right. Now, you believe there are two sides to every story?

"A. Yes.

"Q. All right. And after the Prosecution has rendered their version, you will, of course, wish to hear the Defendant's version, will you not?

"MR. TOKOLY: Objection.

"THE COURT: Sustained. Don't answer. Ask your next question.

"MS. JAMES: Well, Your Honor, I believe this goes to the burden of proof in the right of—

"THE COURT: It's a leading question."

Appellant contends that the attitude of venire members about the accused's right not to testify is a proper area of inquiry on voir dire.

Although it is apparent that the prosecutor's objection was sustained because of the leading nature of the question, and not because of its subject matter, appellant did not rephrase the question. Furthermore, the proper inquiry is not whether the juror might wish the accused to testify, but whether the juror would, regardless of his wishes, follow the law and not consider the silence of the accused as evidence against him. *Barry v. State,* 165 Tex.Cr.R. 204, 305 S.W.2d 580 (1957). The trial court did not abuse its discretion in sustaining the objection.

While questioning Millhollon, appellant's counsel made the following statement concerning courtroom security:

"Q. And there's another matter, that during the trial—I don't know what measures exactly the Court has to secure, whether there will be searches at the door. There will undoubtedly be a large number of Bailiffs and Deputy Sheriffs entrusted with the security of this courtroom and they will be wearing badges and guns and there will be a large number of Sheriffs and other security people around the Courthouse and possibly individual searches of people coming into the courtroom.

"THE COURT: Wait a minute. Where did you get that from?

"MS. JAMES: Well, I don't know if Your Honor plans to search people or not.

"THE COURT: Then let's don't tell the jurors what I'm going to do about security when you don't know."

The statement was obviously based on speculation, and the trial court did not err in refusing to permit questions based thereon.

Finally, appellant asked Millhollon the following question:

"Q. All right. Do you have any hostile feelings toward persons whose life style differs from your own?

"MR. TOKOLY: Judge, that's so vague.

"THE COURT: Sustained."

Appellant has made no showing as to the relevance of this question, other than to assert that it "attempts to determine whether the venireman was one who is prejudiced against, rather than tolerant of, those different from herself." No abuse of discretion is shown. See *Johnson v. State,* 467 S.W.2d 247 (Tex.Cr.App.1971).

Appellant's counsel explained to venire member Leslie Goekler that appellant did not have to testify and that this could not be considered as evidence against him, and Goekler stated that he understood. Goekler was then asked:

". . . We have gone through the presentation of the evidence by the Prosecution; and at that point would you expect the Defendant to testify?

"A. No.

"Q. Well, being honest with yourself, wouldn't you want him to explain—

"MR. TOKOLEY: Objection.

"THE COURT: Sustained. Don't suggest.

"Q. (By Ms. James) Do you think he should testify? Do you think he should—

"MR. TOKOLY: Judge, pardon me. I object to this whole line of questioning because—

"THE COURT: Sustained."

Since appellant had already established that Goekler understood that appellant did not have to testify and that he would not expect him to testify, the trial court did not abuse its discretion in sustaining the objections to the subsequent, essentially duplicitous questions. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

During the voir dire examination of Raymond Wagner, it was established that he had read news stories about the shooting of Officer Wood, but that he remembered few of the details and retained no impression of the stories. Appellant subsequently asked Wagner:

"Q. Would you say that the news stories that you have read were slanted towards the side of the prosecution in this case?

"MR. SCOTT: Objection, Your Honor.

"THE COURT: Sustained.

"Q. (By Ms. James) All right. Were you changed in any of your thinking by any of the newspaper stories that you read?

"A. Well, I haven't really given it any thought.

"Q. All right. It was not a matter of any importance to you at that time?

"A. No, ma'am.

"Q. All right. Did you have an occasion to read in the newspaper any opinion of any prominent person about this case?

"A. No, ma'am."

Appellant contends that the question objected to was an "attempt to elicit the venireman's perception of the articles he previously admitted he had read and remembered." Wagner was thoroughly questioned concerning his memory of the news stories he had read, and he stated that he retained no impression of them. The trial court did not abuse its discretion in sustaining the objection. *Bodde v. State,* supra; *Smith v. State,* supra.

The following also occurred during appellant's examination of Wagner:

"Q. (By Ms. James) If after the prosecution has rendered their version and they have closed their testimony and you have heard all of their evidence and the case is then in the hands of the defense, would you expect Randall Dale Adams to testify?

"MR. TOKOLY: Objection, because the predicate has not been laid.

THE COURT: I understand. What [we] are talking about predicate is this, the ultimate issue that we are asking about is really can you follow the law as I will give it to you at the end of the trial.

JUROR WAGNER: Right, I will follow the law.

"THE COURT: If the Defendant does not testify during the trial then part of the law I will give you would be that in deliberating upon any issue in the case that you are not to consider his failure to testify as any evidence of anything, period.

"All right. You are not to discuss it, consider it or refer to it in any way during your deliberations. Now, some jurors are of the frame of mind that if the Defendant doesn't testify then they would in some way hold that against the Defendant, if they are of that frame of mind then they could not be a fair juror because they could not follow the instructions of the Court. There are some people who just couldn't follow the instructions on that. They may feel like if the Defendant doesn't testify, 'By golly I'm going to convict him,' for whatever reason.

"So Ms. James is trying to find out if the defense—Defendant does not testify in the trial if on one hand you would hold that against him or if on the other hand you could follow the Court's instruction and not consider his silence as a witness—

"JUROR WAGNER: I could follow the Court's instructions.

"THE COURT: Go ahead, Ms. James.

"Q. (By Ms. James) Well, would you want him to testify?

"MR. TOKOLY: Well, I object to that.

"THE COURT: Sustained.

"Q. (By Ms. James) Well, the Court has just given the predicate for you, you have said you would follow the law in the Court's Charge and I think that the Court would charge

you that the Defendant does not have an obligation to testify, but wouldn't you want him to testify?

"MR. TOKOLY: Objection.

"THE COURT: Well, as to whether the juror would want him to testify or not, I'm not going to allow that. Well, no, I beg your pardon. I'm going to sustain the objection. Go on to your next question.

* * * * * *

"Q. (By Ms. James) All right. Being honest with yourself wouldn't you wonder why the Defendant didn't testify?

"MR. TOKOLY: Objection.

"THE COURT: Sustained.

"Q. (By Ms. James) All right. Now, if the Court has followed—has given you the law in the Court's Charge would you wonder why he did not explain himself?

"MR. TOKOLY: Objection.

"THE COURT: Sustained.

"Q. (By Ms. James) All right. Do you think that these thoughts about why he did or didn't testify might be subconsciously affecting your determination of innocence or guilt?

"THE COURT: Do you object to that?

"MR. TOKOLY: Yes.

"THE COURT: I will allow that question provided it be rephrased to not assuming something that is not before the Court.

"Do you feel that any thoughts that you might have about why the Defendant didn't testify or for what reason he didn't testify or any thoughts like that, do you feel that any feelings you might have about it would or could be such that they would prevent you from following my instructions of not considering his silence?

"JUROR WAGNER: No, I would follow the law whatever your Instructions were.

"THE COURT: Any feelings or thoughts you might have about it I take it from what you say would not be such as it would preclude you or prevent you from being able to follow the Court's instructions?

"JUROR WAGNER: That's right.

"THE COURT: Go ahead, Ms. James."

Wagner's ability to follow the law should appellant not testify was thoroughly tested. The trial court did not abuse

its discretion in sustaining the objections. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

A similar exchange took place during the examination of Paul Matlock:

"Q. All right. Now, after the Court has charged you on the law of course that will be after the prosecution has rendered their version, would you expect the Defendant to testify?

"MR. TOKOLY: Here again—

"THE COURT: You have to lay a predicate.

"Q. (By Ms. James) Well, I think that—you know that the Defendant does not have the burden of proof, does not have to testify although he can if he wishes. Now, after the prosecution has rendered their version and after the Court has instructed you on the law would you still expect the Defendant to testify?

"A. Not necessarily.

"Q. All right. Would you think he was hiding something if he didn't testify?

"MR. TOKOLY: Objection.

"THE COURT: Sustained.

Q. (By Ms. James) Well, being honest with yourself, wouldn't you think these thoughts might subconsciously prevent you from following the Court's instructions?

"THE COURT: Don't lead your witness. Rephrase your question.

"Q. (By Ms. James) Do you think that your thoughts might subconsciously affect your determination of innocence or guilt?

"MR. SCOTT: I don't see how a person can answer that.

"THE COURT: Sustain the objection. The question is if the Defendant does not testify you will be instructed by the Court not to consider his silence as any evidence in the case. You are not to discuss it, refer to it or consider it in any way. And the question is if you are on the Jury and that occurs and you are so instructed would you follow that instruction of the Court?

"JUROR MATLOCK: Correct. Yes.

"THE COURT: Go ahead, Ms. James."

Again, no abuse of discretion is shown. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

Venire member Charles Abbott was asked:

"Q. Do you drink?
"A. Occasionally.
"Q. You have no prejudice or otherwise that would cause you to disbelieve anybody who took a drink?
"A. No.

* * * * * *

"Q. (By Ms. James) Well, would you have any bias, even though the law permits drinking, against anybody who drinks which would cause you to disbelieve part or all of his testimony?
"MR. TOKOLY: I object to that.
"THE COURT: Sustained . . ."

The last question was duplicitous; no abuse of discretion is shown. *Bodde v. State,* supra; *Smith v. State,* supra.

The following questions were asked of venire member Leo Cunningham:

"Q. All right. Now, if the Court should instruct you that silence of the Defendant is not evidence, and that he does not have to testify, and if the Court has charged you on the law and after the—this would necessarily be after the Prosecution has rendered its version, would you still expect the Defendant to testify?
"A. I don't think so.
"Q. All right. Would you want him to testify?
"MR. TOKOLY: Now, Judge—
"THE COURT: Sustained.
"MR. TOKOLY: —we object to that."

The second question was essentially a repetition of the first, and we find no abuse of discretion. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

Venire member Lester Hutchings was asked:

"Q. (By Ms. James) Well, if there is evidence of violence in this case or there are descriptions of injuries or wounds leading to death, would that fact alone prejudice you against Randall Dale Adams?
"A. No.
"Q. All right. Would the presence of violence, bloodshed, injury or death shock you or embarrass you so as to interfere with your objectivity?

"A. No, ma'am.
"Q. All right. Would evidence of injuries causing death hamper your consideration of all the other evidence in any way?
"A. I don't think so.
"Q. You're not just going to get grossed out and stampede some way or other?
"A. No, ma'am.
"Q. All right. The Defendant, of course, is entitled to his day in Court; you do agree with that?
"A. Yes, ma'am.
"Q. All right. Would you be upset because this is a case in which someone has died?
"MR. SCOTT: Judge, we object. That—
"THE COURT: Sustained."

The question objected to was duplicitous, and the trial court did not err by sustaining the objection. *Bodde v. State,* supra; *Smith v. State,* supra.

The following exchange took place during appellant's examination of venire member Anita Pritchett:

"Q. All right. Now, if the Court should instruct you that the silence of the person on trial is not evidence and after the Court has charged you on the law and that is a necessity after the prosecution has rendered their version, would you still expect Randall Dale Adams to testify?
"THE COURT: Realizing again, that he has no obligation to testify.
"THE WITNESS: Right. That is his right. If he wants to testify in his behalf, I think that would be—
"Ms. JAMES CONTINUING:
"Q. Would you expect him to explain?
"MR. SCOTT: Judge, I think that is an improper question.
"THE COURT: Sustained."

We again find no abuse of discretion. *Bodde v. State,* supra; *Smith v. State,* supra; *Barry v. State,* supra.

It should be noted, with regard to the questioning of the venire members as to their desire or expectation that appellant testify, that appellant did testify at the guilt-innocence phase of the trial. Thus, the harm, if any, caused appellant by the rulings of the trial court complained of above was rendered moot.

Appellant contends that thirteen venire members were erroneously excluded for cause under V.T.C.A. Penal Code, Sec. 12.31(b), which provides that a prospective jury member in a capital case shall be disqualified unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact. Specifically, appellant contends that by permitting the application of Sec. 12.31(b), supra, to the three punishment issues specified by Art. 37.071, V.A.C.C.P., the trial court bestowed upon the prosecution a broader basis of exclusion than allowed under the rule of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). However, this Court has consistently held that the statutory scheme for the selection of jurors in capital cases in Texas, and in particular the application of Sec. 12.31(b), supra, to the punishment issues, comports with the constitutional requirements of *Witherspoon. Hughes v. State,* 563 S.W.2d 581 (Tex.Cr.App.1978); *Hughes v. State,* 562 S.W.2d 857 (Tex. Cr.App.1978); *Freeman v. State,* 556 S.W.2d 287 (Tex.Cr. App.1977); *Burns v. State,* 556 S.W.2d 270 (Tex.Cr.App. 1977); *Boulware v. State,* 542 S.W.2d 677 (Tex.Cr.App. 1976); *Moore v. State,* 542 S.W.2d 664 (Tex.Cr.App.1976). The trial court did not err in excluding from the jury those venire members who could not state that their deliberations on the punishment issues would not be affected by the mandatory penalty of death or life imprisonment.

Other than to object to the application of the statute to the punishment issues, appellant does not take issue with the trial court's determination that the thirteen venire members were disqualified under Sec. 12.31(b), supra. We have reviewed the voir dire examinations of these venire members and conclude that the trial court was correct in its determination.

Appellant contends that Art. 37.071, V.A.C.C.P., is unconstitutional because the punishment issues specified therein, in particular the second issue, "fail to present for the jury's consideration any concept of 'desert,' thus depriving the defendant of the critical consideration of the jury of any defined standard by which they may decide if the defendant 'ought to die,' this being a requirement of the Constitution as interpreted in *Gregg v. Georgia,* [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)]." In a related argument,

appellant contends that Art. 37.071, supra, is unconstitutional because "there are no provisions for jury lenience if all the special issues are answered affirmatively thus calling for jury negation should the jury believe that under all the circumstances the defendant does not 'deserve' a sentence of death."

Appellant acknowledges that the defendant in a capital case in Texas may offer at the punishment hearing any relevant mitigating evidence. *Jurek v. State,* 522 S.W.2d 934 (Tex.Cr.App.1975), affirmed, *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Robinson v. State,* 548 S.W.2d 63 (Tex.Cr.App.1977). See also *Lockett v. Ohio,* — U.S. —, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, appellant argues that such evidence is of no avail to the defendant if the jury is convinced by the evidence beyond a reasonable doubt that the punishment issues should be answered affirmatively. In such a case, appellant argues, the punishment of death is mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate. Appellant contends that this system is of the sort condemned in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

In *Gregg,* the Supreme Court recognized retribution as one of the underlying purposes of the death penalty. The Court also made it clear that the sentencing authorities must give attention to the nature and circumstances of the crime and to the character of the defendant in determining whether death is the appropriate punishment in a particular case. From this, appellant asserts that "[i]t may no longer be doubted that there must be a finding that the individual adjudged guilty of a capital crime 'deserves to die' before he can be so sentenced." But the Court clearly did not intend that the sentencing authority be given such broad discretion to decide whether a given defendant ought to receive the death penalty:

> "*Furman* [*v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion should be suitably directed and

limited so as to minimize the risk of wholly arbitrary and capricious action."

Gregg v. Georgia, supra, 428 U.S. at 189, 96 S.Ct. at 2932.

The Supreme Court has described the Texas capital sentencing scheme as follows:

> ". . . Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defenses can bring before it . . . [T]he Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."

Jurek v. Texas, supra, 428 U.S. at 273, 274, 96 S.Ct. at 2957. Appellant would substitute for this guided discretion the right of the jury to decide, by its own lights, whether or not the defendant ought to die. The flaw in appellant's argument is best seen when it is turned around: if a defendant may not be given the death penalty, regardless of the jury's answers to the punishment issues, unless the jury believes that he "deserves to die," it would follow that if the jury so believes, then the defendant must be sentenced to death regardless of the answers to the punishment issues. Thus, appellant would return to the jury in a capital case the unbridled discretion to impose the death penalty condemned in *Furman v. Georgia,* supra.

Lockett v. Ohio, supra, does not support appellant's contentions. In *Lockett,* the Court held that the Ohio capital sentencing scheme was unconstitutional because the sentencing authority was permitted to consider only three specified mitigating circumstances. The Court held that any relevant mitigating evidence offered by the defendant must be considered by the sentencing authority in determining whether the punishment of death should be imposed. Texas practice is in accord with this holding. *Jurek v. State,* supra; *Robinson v. State,* supra. At the same time, the Court re-stated the view of the plurality in *Gregg* that the discretion of the sentencing authority must be "directed and limited" so that the death penalty will be imposed in a consistent manner. *Lockett v. Ohio,* supra, 98 S.Ct. at 2963. The three issues specified in Art. 37.071, supra, provide this direction and limit the discretion of the jury so as to prevent the arbitrary or capricious imposition of the death penalty.

Contrary to appellant's contention, Art. 37.071, supra, is not a mandatory statute of the sort held unconstitutional in *Woodson v. Norh Carolina,* supra, and *Roberts v. Louisiana,* supra. The statutes struck down in *Woodson* and *Roberts* mandated the death penalty for all defendants convicted of first-degree murder, without consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender. These statutes invited juries to disregard their oaths and the trial judge's instructions and choose either a not guilty verdict or a guilty verdict for a lesser offense whenever they felt that the death penalty was inappropriate. Thus, the North Carolina and Louisiana capital sentencing procedures did not provide standards to channel jury judgments, nor did they permit review to check the arbitrary exercise of the capital jury's de facto sentencing discretion.

Although the death penalty in Texas is mandatory upon the return of affirmative answers to the three punishment issues, Art. 37.071, supra, the jury does not consider the punishment issues unless it has first found the defendant guilty of murder under certain specified aggravating circumstances. V.T.C.A. Penal Code, Sec. 19.03. Furthermore, in answering the punishment issues the jury must consider all the relevant evidence concerning the particular offense and the individual defendant offered by the State or by the accused. *Jurek v. State,* supra; *Robinson v. State,* supra. The punishment issues give guidance to the jury regarding those factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision. *Gregg v. Georgia,* supra, 428 U.S. at 192, 96 S.Ct. 2909. The punishment issues provide for the guided jury discretion found wanting in pre-*Furman* death penalty statutes and in the statutes in question in *Woodson* and *Roberts.*

We hold that Art. 37.071, supra, is not unconstitutional for failure to present for the consideration of the jury the concept of "desert." We also hold that Art. 37.071, supra,

does not impose the death penalty in an unconstitutionally mandatory manner.

Appellant contends that the phrase "criminal acts of violence" contained in the second punishment issue is a technical legal phrase which must be defined in the jury charge. He further contends that left undefined, the phrase is unconstitutionally vague and calls upon the jury to decide a question beyond its competence. These contentions have been presented to and rejected by both this Court and the United States Supreme Court. *Jurek v. Texas,* supra; *Jurek v. State,* supra; *Blansett v. State,* 556 S.W.2d 322 (Tex.Cr. App.1977); *King v. State,* 553 S.W.2d 105 (Tex.Cr.App. 1977); *Battie v. State,* 551 S.W.2d 401 (Tex.Cr.App.1977).

In his final ground of error, appellant contends that the evidence is insufficient to support the jury's affirmative answer to the second punishment issue. The record discloses that appellant's only prior criminal conviction was for driving an automobile while intoxicated. Appellant had also been absent without leave for a short time during his service in the Army. At the punishment hearing, Dr. John Holbrook, a psychiatrist, testified that he had examined appellant and determined that he has the profile and characteristics of a sociopath. Holbrook also testified that he would expect little or no change in this diagnosis in the future and that, in his opinion, appellant would commit criminal acts of violence in the future that would constitute a continuing threat to society. Dr. James Grigson, another psychiatrist, gave similar testimony. This testimony, when considered with the evidence of the crime itself, which was a particularly senseless and motiveless killing, is sufficient to support the jury's determination that appellant would constitute a continuing threat to society. *Ferguson v. State,* 573 S.W.2d 516 (Tex.Cr.App.1978); *Shippy v. State,* 556 S.W.2d 246 (Tex.Cr.App.1977); *Moore v. State,* 542 S.W.2d 664 (Tex.Cr.App.1976).

The judgment is affirmed.

SUPREME COURT OF THE UNITED STATES

No. 79-5175

RANDALL DALE ADAMS, PETITIONER,

v.

TEXAS

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Texas.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted, limited to the questions presented by the Court: (1) Is the doctrine of *Witherspoon* v. *Illinois,* 391 U.S. 510, applicable to the bifurcated procedure employed by Texas in capital cases? (2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31(b) violate the doctrine of *Witherspoon* v. *Illinois, supra*?

December 10, 1979

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